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GROUP PREFERENCES AND THE LAW

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Group Preferences and the Law, Seri...

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

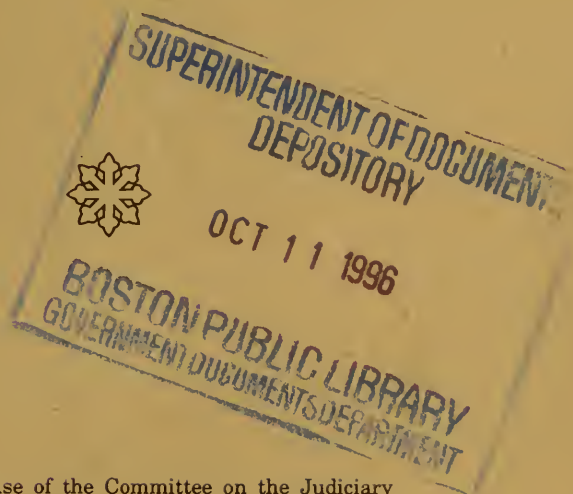
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

APRIL 3, JUNE 1, AND OCTOBER 25, 1995

Serial No. 74



Printed for the use of the Committee on the Judiciary

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GROUP PREFERENCES AND THE LAW

MONDAY, APRIL 3, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:04 p.m., in room 2237, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, F. James Sensenbrenner, Jr., Barney Frank, and José E. Serrano.

Also present: Kathryn A. Hazeem, chief counsel; Jacqueline McKee, paralegal; and Robert Raben, minority counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will come to order.

I would like to ask that members limit opening statements so that we can get to our first panel of witnesses, some of whom have traveled great distances to be with us this afternoon. We should not be interrupted by votes this afternoon. However, the Rules Committee will meet at 5 to consider a rule for H.R. 660, a bill that is within the jurisdiction of this subcommittee.

Without objection, any opening statements of members will be included in the record.

I want to welcome each of the witnesses who are with us here today. Our policy has been to allow Members not on the subcommittee to have time yielded to them by subcommittee members if they want to ask questions or to speak to—ask questions of the witnesses that speak and we will continue to follow that policy today.

Today, will be the first of many hearings in this subcommittee to examine group preferences in the law. When Congress passed the bulk of this Nation's civil rights legislation in the 1960's, its goal was to ensure that race would not be a source of advantage or disadvantage for anyone. Specifically, with the Civil Rights Act of 1964, Congress sought to remedy the deplorable situation in which qualified individuals were denied employment because in the prejudiced eyes of some, their skin was the wrong color or their ancestors came from the wrong country or because they were of the wrong gender.

Congress was seeking to enshrine the principle into law that people have a right to be judged as individuals for their individual skills, experience and qualifications rather than as group members, that is, on the basis of the color of their skin, their country of ori-

gin or their gender. Unfortunately, through administrative and judicial action, the law quickly deviated from this principle of neutrality and nondiscrimination into a system of counting citizens by race or gender, and doling out advantages and disadvantages accordingly. Thirty years later, this type of discrimination permeates our law.

The Congressional Research Service recently prepared a report in which it identified over 160 such programs in which the Federal Government disburses benefits or grants preferences based on race, ethnic origin and gender. The question before our society and this subcommittee today is this: Is discrimination the solution to discrimination or do we return to the principle of nondiscrimination and neutrality?

Should an individual be granted or denied special benefits simply because of that individual's race, ethnic origin or gender? It is time to closely and intelligently reexamine these issues.

Today, we will explore the programs and principles at the heart of this debate and lay the groundwork for future hearings in which we will focus on specific programs in the areas of employment, voting, housing, insurance, mortgage lending, contracting and education.

About a decade ago, Harvey C. Mansfield, Jr., professor of government at Harvard University, observed that affirmative action is perhaps the most interesting policy issue of our day because it reveals how we understand our Constitution. How we understand our Constitution shows how we understand ourselves as a free people, what our condition is and where we are tending. It is my hope that today's hearing will give us all a better understanding of these fundamental matters.

Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman.

I agree this is a very important hearing. All of us wish that we lived in a society which had no significant prejudice against people based on their gender, their race, their ethnic origin, or sexual orientation or their physical condition. In fact, while we as a society have made enormous progress in diminution of these prejudices, I think it is unfortunately clear that they still exist. So the question we have is, given unanimity on the goal of a society in which people are judged entirely on their individual merits, how do we get there?

What is one difference with what I heard you describe, Mr. Chairman—I have several, but at one point, I thought I heard you say through judicial and executive actions this had happened. My understanding is that the Congress was also very much involved in this. Indeed, that there are a number of statutes that were voted which seek to effectuate the goal of eliminating prejudice from our society by taking into account the reality and, in some cases, requiring that people demonstrate that they have made a real effort to get rid of prejudice.

We have on the books antidiscrimination laws. They were, of course, a long time in coming. They were strongly opposed. Unfortunately, in our legal system—and I think a good aspect of our legal system, the burden of proof when we are talking about individual acts of discrimination is on the accuser, as it ought to be.

Typically, when you pass an antidiscrimination statute, you may have some cases laying around when people were fairly crude in their prejudicial acts before the statute passed but after an anti-discrimination statute is on the books for a while, people learn how to deal with it, and proving individual acts of discrimination is not always easy. It does seem to me a society that wants to do away with prejudice, when it confronts situations in which people of a particular race or a particular sex or a particular ethnic background are clearly excluded from an important area of our social life, have to look at what may have caused that and what we can do about it.

There are examples of affirmative action which have from time to time been in error. I believe we are still in a situation in which prejudice exists, in which people who are African-American, women, Hispanic-Americans and others encounter discrimination and the notion that we can solve this problem by pretending that it is not there seems to me erroneous.

So I look forward to an effort in which we in good faith look at what we have done, and how on a broadly bipartisan basis over this period of time—and we should be very clear that the evolution of affirmative action policies has been a bipartisan one and involved all branches of government. All of us understood we confronted a situation in society that racism was the law of the land until fairly recently in our Nation's history. And people who have grown up in that kind of a society understand that you can't simply will it away.

So we do have a difficult issue, because how do you balance the goal of absolute prohibition of discrimination or prejudice of any kind with the methods of getting there? And the particular point at issue I think that divides many of us is we don't believe that you can ignore the continued existence of prejudice. And I believe that some of the approaches to this particular difficult issue would do exactly that.

So our goal is to try to continue to improve our approaches and to come up with a way in which we can deal with the prejudices that, unfortunately, still exist as we get to the goal of a society in which they are no longer a problem. And I look forward to hearing what the witnesses have to say about all that.

Mr. CANADY. Thank you, Mr. Frank.

I do want to thank each of our witnesses for being here today. I will introduce the witnesses in the order in which they will testify.

Hugh Davis Graham is chairman of the history department of Vanderbilt University. He is the author of "The Civil Rights Era, Origins and Development of National Policy," a comprehensive book on the history of affirmative action in America. Mary Frances Berry is Chair of the U.S. Commission on Civil Rights and the Geraldine R. Segal professor of American social thought and professor of history at the University of Pennsylvania; Linda Chavez is president and John M. Owen Fellow, at the Center for Equal Opportunity based in Washington, DC.

William R. Taylor is a lawyer, teacher and writer in the field of civil rights and education. He practices law in Washington, specializing in litigation and other forms of advocacy on behalf of low-in-

come and minority children. Glynn Custred is a professor of anthropology at California State University, Haywood, and coauthor of the California Civil Rights Initiative, a proposed ballot amendment to the constitution of the State of California.

Professor Graham, would you please begin.

Thank you.

**STATEMENT OF HUGH DAVIS GRAHAM, HOLLAND McTYEIRE
PROFESSOR OF AMERICAN HISTORY, VANDERBILT UNIVERSITY**

Mr. GRAHAM. Good afternoon, and thank you for this opportunity to testify.

You have my written statement. I have a brief summary.

My argument concentrates on the 1960's when Congress passed three major civil rights laws against a background of almost no national experience in Federal enforcement of the policies they established.

The result was twofold: First, the three statutes were remarkably successful in their intended consequences. Second, they have surprised and confounded us in their unintended consequences.

Two of the three, the Civil Rights Act of 1964 and the Voting Rights Act of 1965, have always stood at the center of our debates over civil rights policy. The third has not, but it should have. This is the Immigration Act of 1965.

All three laws were liberal reforms abolishing group preference systems in the name of equal individual rights. Yet, all three led to the development of new group preference systems, consequences that were unplanned and unanticipated.

Senator Hubert Humphrey, one of the strongest advocates of nondiscrimination reforms in the 1960's, was sincere when he said he would eat his hat if they led to minority preferences. Looking backward, we can see how and when this happened.

The postwar growth of Federal contracts and grants, popular and relatively stringless prior to the 1960's, created dependencies among recipient State and local governments, private businesses, school systems and universities, hospitals and other institutions. Beginning in 1964, Congress responded to mobilized African-Americans, of ethnic minorities, feminists, environmentalists, and consumer and safety advocates by enacting statutory protections against social harms and risk.

New agencies of social regulation enforced the new protections by making rules that cut across industrial sector boundaries. The result was a sea of change following the 1960's in the nature of the American administrative state. Paradoxically, the size of the Federal bureaucracy and its discretionary budget declined in relation to State and local governments and expanding entitlements.

Yet, the reach of the Federal regulation grew ever more intrusive under the accumulating burdens of cost-cutting agency requirements and unfunded mandates. The periodic reports to Congress of the Advisory Commission on Intergovernmental Relations during the 1970's and the 1980's, read like a worsening nightmare of public administration.

In civil rights policy, the pattern was set by title VI of the Civil Rights Act. It offered brief and general language that new enforce-

ment agencies like the Office for Civil Rights and the Office of Federal Contract Compliance could flesh out in detailed regulations. The effectiveness of the title VI model during the Nixon Presidency in enforcing school integration, increasing minority hiring, and requiring bilingual education for Hispanic students led other rights-based advocacy groups to demand similar programs tailored to their needs.

Congress obliged by essentially cloning title VI—for women in title IX of the education amendments of 1972, for the handicapped in section 504 of the Rehabilitation Act of 1973, for the elderly in the Age Discrimination Act of 1975. By 1975, the basic ingredients of the new system were in place.

First, a title VI-style statute for each major rights-based constituency, which armed enforcement agencies with control of Federal funding and provided wide latitude for agency discretion in setting requirements.

Second, advocacy group constituencies mobilized to press for the most advantageous interpretation of these requirements.

Third, an array of new enforcement agencies, the Office for Civil Rights in HEW, the Office of Federal Contract Compliance in Labor, contract compliance offices in more than 20 mission agencies, paralleled by the EEOC and loosely coordinated through the Civil Rights Division of the Justice Department.

Given these ingredients, what happened should bring no surprise to students of American political culture. First, the enforcement agencies were staffed largely by members and advocates of the constituencies seeking benefits. This pattern was long familiar in traditional mission agencies dealing with agriculture, veterans, small business, labor, education and the like.

Second, regulations multiplied to redistribute benefits to designated protected classes.

Third, over time, benefits tended to accrue more to advantaged constituencies, less to the disadvantaged.

Fourth, programs adopted under a temporary rationale became permanent.

Finally, as the system expanded, it was institutionalized through civil service routines, recruitment networks, accumulating court precedents, and "iron triangle" ties between congressional committees, agencies, and organized advocacy groups. Politically, the affirmative action regime in civil rights policy was strengthened by the able lobbying of the Leadership Conference on Civil Rights.

We see benchmarks of this maturing process during the Carter years: The public works contract set—sides of 1977, enacted without hearings; the administrative consolidations of the Office of Federal Contract Compliance and the EEOC in 1978; the Supreme Court decisions in *Weber* in 1979 and *Fullilove* in 1980.

For me, the year 1980 provides a rough benchmark, not because of Reagan's conservative mandate, but rather in spite of it. In my view, the Reagan-Bush counteroffensive against affirmative action preferences was mostly defeated by the civil rights coalition in Congress and in the agencies. Witness the voting rights revisions of 1982, the internal collapse during 1985 and 1986 of the Meese-Reynolds campaign to rewrite the affirmative action order; the rejection of the Bork nomination; the override of Reagan's 1988 veto

in the regulatory dispute over the *Grove City College* decision; the 1990 enactment under Republican leadership of the Americans with Disabilities Act; and the passage of the Civil Rights Act of 1991. Add to this the proliferation during the Reagan-Bush years of set-aside requirements in budgets for most mission agencies and the rapid spread of contract set-aside programs in city and county governments. Thus, 1980 marks a rough watershed of diminishing returns in civil rights policy.

During the 1960's and 1970's, inherited patterns of unfairness against racial and ethnic minorities, women, the elderly, and the disabled supported arguments for accelerated redistribution through affirmative action preferences. By the 1980's, however, these programs had built self-generating momentum. Increasingly, they aided advantaged sectors and suffered from the kind of abuses seen in the Wedtech scandal and in State and local set-aside programs that reward certain bloodline claims.

Since 1965, more than 25 million immigrants, three-quarters of them from Latin America and Asia, have come to the United States. Though newly arrived, they increasingly have qualified for group preferences over Americans whose citizenship reached back many generations.

Here then is the nub of the problem: When affirmative action began, it was backed by strong historical and moral claims to compensatory justice. Our system of interest group pluralism, however, inherently expands and entrenches such programs. It spins them outward to embrace new constituencies with different needs, warping their logic in a process of accumulating contradictions.

By the mid-1980's, we began to see in the polls growing resentment against affirmative action preferences. By majorities as high as 80 percent, white Americans of both sexes said it was unfair to privilege some individuals and punish others because of group attributes they were born with.

Paradoxically, the more institutionalized and effective the affirmative action system became in redistributing benefits toward expanded protected-class constituencies, the weaker became the system's claims to fairness. In this direction lies great danger. We are polarizing as a society along an affirmative action fault line. It may be that some kind of fundamental triage is necessary, that marginal reforms won't really dent such an entrenched system. I don't know the best answer.

Historians aren't much good at predicting what we ought to do. I am a southern white male and I am old enough to have benefited from one of America's most notorious group preference systems. By law, I went to Jim Crow schools. Few of us engage this issue with an entirely clean slate. My best service is to try to help understand how our system of civil rights policy and regulation developed the way it did and with what consequences.

I hope I can respond usefully to your comments and questions. Thank you.

Mr. CANADY. Thank you, Professor Graham.

[The prepared statement of Mr. Graham follows:]

PREPARED STATEMENT OF HUGH DAVIS GRAHAM, MCTYEIRE PROFESSOR OF
AMERICAN HISTORY, VANDERBILT UNIVERSITY

In 1994 and 1995 we commemorated the 30th anniversary of the great civil rights acts of the 1960s in an atmosphere of gloom. The media are filled with depressing reports about inner city violence and family breakdown, racial and ethnic isolation in schools and housing, campus turmoil over multiculturalism and political correctness and speech codes, the pathology of a heavily minority underclass. Why has the nation's extraordinary expansion of civil rights protections since 1964 left us with so little satisfaction? Our debates over the past two decades, polarized over the wisdom and effectiveness of race-conscious affirmative action policies, have grown repetitive and sterile. I want to pose a question and try to answer it with a historical explanation. The question is: Why did these breakthrough laws of the 1960s produce not only immediate and unprecedented success in their intended consequences, but also, a generation later, increasing social polarization in their unintended consequences?

Two of the three laws are familiar, both in their early successes and their current controversies. The Civil Rights Act of 1964 broke the back of the racial caste system in the South -- its primary goal -- and also sparked the modern feminist drive against sex discrimination. Thirty years later, however, polls showed that four out of five white Americans, female as well as male, regarded as unfair the minority preference policies based on the Civil Rights Act. Similarly, the Voting Rights Act of 1965 brought a political revolution to the South. Yet 30 years later, American society was deeply divided over the unusual shapes and political reasoning behind newly-drawn minority-majority electoral districts.

The third momentous civil rights act of the 1960s, though not customari-

ly linked to the first two, is the Immigration Reform Act of 1965. That reform banished from American immigration law a racial and ethnic preference system based on national origins quotas. It would produce no significant increase in immigration, its sponsors explained. Yet 30 years later, more than 20 million legal immigrants and perhaps a third again as many illegal immigrants had come to the United States, and approximately three-fourths of them qualified upon arrival for minority group preferences over Americans whose citizenship reached back many generations. In their intended consequences the three civil rights laws banished practices that had guaranteed social unfairness for generations and in some cases centuries. Yet in their unintended consequences the three laws contradicted the pledges and expectations of sponsors whose sincerity was unquestioned. Why?

The answer, as this audience well knows, is complicated. Most of our laws, following familiar American patterns of incremental adjustment, do not bring greatly surprising consequences. These three surprised us partly because we lacked historical experience. With the exception a brief and failed Reconstruction after the Civil War, Congress had left most matters of civil rights and electoral arrangements to state and local governments. Congress on the other hand had considerable expertise in restricting immigration, but did not anticipate the explosive power of global population and migration pressures in a policy-making environment driven by public law litigation. My explanation will concentrate on the development during the 1960s and 1970s of a new regime of social regulation in which the 1964 Civil Rights Act played a pivotal role. Congress developed the "new" social regulation in response to a surge of social movements during the 1960s whose shared attributes gave the new form of regulation its name and distinguished it from the "old" economic regulation.¹

The New Social Regulation

What were the shared attributes that linked civil rights reform and social regulation? One was a common origin in social-movement mobilizations,

first on behalf of African Americans, then on behalf of women, students, consumers and workers, the environment. Second, these grass-roots movements sought protection from an array of social evils that included employment discrimination, a polluted environment, dangerous products and services, unsafe transportation and workplaces. Third, to provide this protection Congress established an array of new regulatory agencies -- the Equal Employment Opportunity Commission (1964), the National Transportation Safety Board (1966), the Environmental Protection Agency (1970), the Occupational Safety and Health Administration (1970), the Consumer Product Safety Commission (1972) and others. Additional enforcement subagencies were established by the executive branch, for example the Office for Civil Rights (OCR) in HEW in 1965, the Office of Federal Contract Compliance (OFCC) in Labor in 1965, the Office of Minority Business Enterprise (OMBE) in Commerce in 1969.

These new agencies developed a model of social regulation that differed fundamentally from the older economic regulation. The latter emphasized independent, quasi-judicial boards and commissions, responding to complaints (rate-fixing, anti-competitive practices, unfair labor practices) in adversarial proceedings, deciding cases with court-like decrees (complaint dismissal, rate approval, cease-and-desist orders, penalties and relief). Social regulation, on the other hand, was proactive, emphasizing future compliance to reduce risk and eliminate hazards, not punishment for past misdeeds. The methods of social regulation, more legislative than adjudicatory, centered on notice-and-comment rulemaking and emphasized scientific expertise for setting standards of compliance. The agencies of social and economic regulation also differed structurally. Economic regulation was generally organized vertically, with agencies presiding over specific industrial sectors (surface transportation, communications, securities, airlines). Social regulation was organized horizontally, cutting across sector boundaries to clean the nation's air and water, eliminate employment discrimination, improve transportation safety, increase access for the handicapped, combat consumer fraud.

Because the new social regulation was rooted in the insurgent politics of the 1960s, the new agencies of social regulation needed to enforce their rulings in a way that produced significant and measurable results quickly. Because social regulation, unlike most economic regulation, was not sector-specific, effective regulation would require authority that cut across industrial boundaries and government jurisdictions. For federal agencies setting standards of compliance for air and water pollution or for industrial and consumer safety, the legitimacy of broad congressional authority over interstate commerce had been established by the New Deal. For federal agencies seeking to impose new nationwide controls, however, on the hiring and promotion practices of private firms or state and local governments, or on the educational policies of public and private schools and colleges, the authority of Washington was greatly narrowed by the traditions of federalism. For civil rights regulation, this was the decisive battleground of the 1960s.

The Watershed of the 1960s: Federal Aid and Title VI

When I attempt to reconstruct the postwar development of regulatory and civil rights policy, I am drawn to two great changes, one occurring in 1964, the other at the end of the decade, in the first years of the Nixon presidency. The first of these events is the enactment of Title VI of the Civil Rights Act. The second is the shift in enforcement strategy from traditional nondiscrimination policing, as exemplified by the anti-discrimination commissions in the northern industrial states and the original design of the EEOC, to minority preference requirements under the adverse impact standard adopted during 1969-1971. Each of these two watershed events marks a rare moment of decisive change in our history. On either side of them, during the years 1945-1964 and later during the 1970s, important changes were occurring in the nature of civil rights enforcement and the American regulatory state itself, but they were more gradual and cumulative and their meaning was heavily determined by the sea changes of 1964 and 1969-71.

From the perspective of the 1960s, the heart of the Civil Rights Act was

Title II and VII; from the perspective of the 1990s, it was Title VI. The efficacy of Title VI as an instrument of federal regulation rested on the increasing financial dependence of state and local governments and the private industrial economy on federal grants and contracts. For the modern era this began in 1946 with the Hill-Burton Hospital Survey and Construction Act, when Congress began to build an inventory of assistance programs to benefit local communities while requiring little from recipients in exchange. Between 1946 and 1963 the federal system experienced a fiscal revolution that increased the dollar amount of federal aid to state and local governments from \$701 million to \$4.8 billion.² Washington's financial assistance took the form mainly of categorical grants-in-aid to help cities and states build roads, airports, hospitals, water systems and other facilities to support rapid metropolitan growth.

Because state sales taxes and local property taxes were inadequate to pay for needed support services, Congress tapped the growing pool of federal income tax revenue, voting frequently to add new aid programs while rarely needing to raise tax rates. Congress and the funding agencies attached few strings to the grant programs, other than standard technical requirements. In the vernacular of the mission agencies, the metaphor of the popular grant-in-aid programs was "leave it on the stump and run." As James Sundquist observed in a 1969 study of federalism, state and local governments are "subject to no federal discipline except through the granting or denial of federal aid" -- a sanction that "is not very useful, because to deny the funds is in effect a veto of the national objective itself."³ The categorical grant programs were popular because they served local needs, were loosely administered by federal officials, and mutually served the political interests of Washington's triangular bargaining networks.

During the 1960s the federal grant system expanded dramatically. In 1962 there were 160 categorical programs. In 1965 there were 330. By 1970, there were 530. Eighty percent of these were legislated after 1960 -- 158 of them in 1965-66 alone, the bonanza year of the 89th Congress and the Great

Society. In the "categorical explosion" of 1964-1968, Congress poured money into the states and cities to aid education, rebuild urban areas and transportation networks, assist anti-poverty programs, reduce water and air pollution. Federal aid outlays to state and local governments, \$2.3 billion in 1951, grew to \$7 billion in 1960 and to \$23 billion by 1970 (\$77.5 billion in 1990 dollars). As a percentage of domestic federal outlays, grants amounted to 16.4 percent in 1960 and 21.9 percent in 1970.⁴ The proliferation of grants, when added to billions in annual contracts awarded by federal agencies for goods and services, especially during the years of the Vietnam War and the space race, meant that by 1970 federal assistance in the form of grants and contracts reached deeply into the recesses of 3,044 counties, 18,517 municipalities, 15,781 school districts, and 23,885 special districts, and federal contracts funded the work of 250,000 businesses employing more than 20 million workers.

Accompanying this growth in the 1960s was a sharp increase in performance requirements for recipients of federal funds. The federal lunch had never been free, and the gradual attachment of additional strings to federal grants has a long secular history.⁵ But most federal controls were project-specific rather than cross-cutting. They were tailored by agency experts to fit the specific practical needs of projects in agricultural experiment and extension, water control, biomedical research, road and airport building, hospital construction. During the 1960s, however, the federal government made the most significant change in federal assistance programs and their control since the land-grant program was created in 1862. The instrument of this change was Title VI.

Most attention during the great debates of 1963-64 was riveted on Title II on public accommodations desegregation and Title VII on fair employment. The sleeper provision, Title VI, provided the chief leverage for national enforcement after 1970 of an adverse impact standard in minority rights. Title VI also created a model for comprehensive federal regulation through cross-cutting requirements reaching far beyond the arena of race relations

that dominated the events of 1964. As proposed in the original, post-Birmingham bill of 1963, Title VI would deny funds to federally assisted programs that discriminated against individuals because of their race, religion, or national origin. This was the "universal Powell amendment," the provision floated in the summer of 1963 by the Kennedy White House. It found surprisingly wide and bipartisan support from nonsoutherners in Congress because it was explainable to constituents in practical terms (preventing tax dollars from strengthening segregation) and because it offered an escape from the perennial and often self-destructive Powell amendment.⁶ Title VI's sole substantive prohibition provides: "No person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance."⁷

Title VI was debated in Congress and was attacked by southern conservatives, most notably by senators Sam Ervin of North Carolina and Richard Russell of Georgia, who deplored its vagueness in not defining the term "discrimination" (Russell called Title VI "the realization of a bureaucrat's prayers"). In the process of negotiations it was narrowed by various constraining amendments in the House and, in the Senate, by a "pinpoint" provision that confined its application to the "the particular program or part thereof in which noncompliance has been found." But Title VI retained its simple purpose and its enormous potential power. Given the deep attachment of Congress to traditional patterns of federalism in domestic legislation, it is difficult to imagine congressional approval of such a mighty sword for the executive branch in any circumstance less explosive than the civil rights crisis of 1963-1964. The target seemed self-evidently confined to the no-longer tolerable world of Bull Connor.

In attacking segregated stores, hotels, and restaurants, Title II "tore old Dixie down" almost overnight. The Justice Department, working with Labor Department officials (especially the OFCC) and the EEOC, effectively used a combination of Title VI, President Johnson's Executive Order 11246, and Title

VII to desegregate employment all over the South.⁸ On the whole the Civil Rights Act worked quickly and efficiently (low costs, high benefits) in achieving its goal of destroying the Jim Crow caste system in the South. In our modern racial anxiet, this is too easily forgotten. In this, the "longest debate" in the history of Congress, I have seen no evidence that the supporters of the major titles of the Civil Rights Act, including Title VI, were insincere in believing that its use would be largely confined to punishing racial discriminators in the South.⁹ Nor is there any reason to believe Senator Hubert Humphrey insincere when he pledged to eat his hat if Title VII ever led to racial preferences in public policy. The shift from the nondiscrimination or equal-treatment standard of 1964 to the adverse impact or proportional-results standard of the early 1970s is the second of the great sea changes in regulatory policy brought by the 1960s.

The Shift to Affirmative Action Preferences during the Nixon Administration

That change came with the Philadelphia Plan, resurrected by Labor secretary George P. Shultz in the early months of 1969 and escorted safely by the determined Nixon White House through a congressional counterattack led by an unusual coalition of southern Democrats, Republican conservatives, and organized labor. In The Civil Rights Era I described this as a decisive turning point in the development of federal civil rights policy, one that was unlikely to have occurred in the absence of Richard Nixon's surprising defense of the minority hiring formulas developed by the OFCC. Could such a controversial shift have occurred in the absence of Nixon's support? A plausible affirmative argument can be made, citing momentum supporting race-conscious affirmative action standards in the federal courts, in the enforcement agencies, where staffs increasingly reflected the interests of the protected classes, and in Congress, where the Leadership Conference for Civil Rights was growing in membership and effectiveness. I am doubtful, but historical explanations must rely on actual not hypothetical events. The reality remains that a president who nominated G. Harrold Carswell to the Supreme Court,

denounced racial quotas, and seriously proposed a constitutional amendment against school busing nonetheless effectively institutionalized a system of minority employment preferences that rested on Title VI and on executive orders (including his own) directing its enforcement.

The causes for the national shift in rights-enforcement policy during 1969-1971 are complex. They include the urgency generated by the urban rioting of 1965-68, the skill of the civil rights coalition in lobbying legislators and agency officials and in staffing the new enforcement agencies, and the support provided by federal courts, especially in Contractors Association and above all in Griggs.¹⁰ Within the Nixon administration they include the president's determination to split the labor-civil rights alliance, speed the growth of a conservative black middle class, associate "racial quotas" in the public mind with the liberal legacy of the Democratic party, and appeal to working-class resentment of court-ordered busing and "reverse discrimination."¹¹ These events helped produce a seismic shift in the American political landscape. It included the mass defection of southern and blue-collar whites from the New Deal coalition, the emergence of a Republican presidential majority and with it conservative trends in the executive and judicial branches, and a deep split in the civil rights coalition over the principle of constitutional color-blindness.¹² Within the Washington beltway, the Title VI model offered opportunities to newly mobilizing clientele groups to expand government benefits from rights-based claims.

Federal Regulatory Expansion in the 1970s: Cloning Title VI

Within a year following the passage of Title VI, Congress in the Elementary and Secondary Education Act authorized a billion-dollar aid program to local school districts. Soon thereafter the newly established Office for Civil Rights in HEW began demonstrating the leverage provided by cross-cutting regulations. In 1969 the OFCC using the Philadelphia Plan required sharp increases in minority employment in federally-assisted construction projects, then in 1970 the OFCC in Order No. 4 extended the model of proportional

minority hiring to all government contracts. The effectiveness of the Title VI model of cross-cutting regulation in winning impressive gains in employment and education for racial and ethnic minorities was not lost on the leaders of other movements, most notably feminist groups, the physically handicapped, and the elderly. By 1975 advocacy groups representing all four constituencies had persuaded Congress to borrow the language of Title VI and apply it to their own regulatory needs.¹³

Feminist groups like the National Organization of Women and the Women's Equity Action League, having persuaded Lyndon Johnson in 1967 to include sex discrimination in the executive order program enforcing Title VI, won similar inclusion of women from the OFFC in its Revised Order No. 4 in 1971. In 1972 Congress by voice vote passed Title IX, an amendment to the education statutes that barred federal financial assistance to any educational program or activity that practiced sex discrimination. The following year, 1973, Congress in Section 504 of the Rehabilitation Act reshaped the familiar language of Title VI to read as follows: "No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any program or activity receiving Federal financial assistance." In the Age Discrimination Act of 1975, Congress again borrowed the language of Title VI and filled in the modifier blank with "age" discrimination.

These extensions of the Title VI device during the 1970s differed from the pioneering efforts of the 1960s in several respects. In each instance a far-reaching expansion of cross-cutting regulation occurred with little grassroots pressure from constituency movements, little attention in the media, and little congressional debate. Grassroots constituencies do not understand the arcane workings of federal regulation. Policy entrepreneurs in Washington, however, do. Working quietly with advocacy-group lobbies, they extended Title VI's cross-cutting formula to protect new groups, often "with virtually no discussion or debate about the similarities and differences in

the forms of discrimination faced by different groups and the types of remedies that might prove most effective in dealing with them."¹⁴ Section 504 of the Rehabilitation Act, taken almost verbatim from Title VI and enacted without hearings, demonstrated an important difference between regulatory laws on behalf of civil rights constituencies (racial and ethnic minorities, women, the elderly, the handicapped) and legislation governing other forms of social regulation (consumer fraud, health and safety, environmental protection). In the detailed statutes governing EPA or OSHA, for example, Congress stipulated precise standards for agency enforcement. In the protected-class extensions based on Title VI, on the other hand, Congress delegated wide discretion to the enforcement agencies. In Section 504 of the Rehabilitation Act, for example, Congress surely did not mean what it appeared to say (that blind individuals could drive taxis so long as they were "otherwise qualified").¹⁵ What Section 504 did require would be decided later, mainly by staff lawyers in the OCR and the OFCC, working in consultation with disability rights organizations. Their regulations, following the path of federal aid, would cover every school system in the country, most colleges and universities, more than 300,000 private businesses, and 23 million employees.

Deregulation and Regulatory Reform: The Civil Rights Exclusion

These developments coincided, however, with a rising chorus of complaints against excessive Washington regulation from the business community and from state and local governments.¹⁶ By the early 1980s the U.S. Advisory Commission on Intergovernmental Relations, established by Congress in 1959 to monitor the health of federalism, was describing the sprawling regulatory state as administratively fragmented, inflexible, inefficient, inconsistent, intrusive, ineffective, and unaccountable.¹⁷ The revolt against overregulation, spurred by the sluggish economy of the 1970s, made significant gains in the Carter administration with legislative deregulation in air and surface transportation. The deregulation movement concentrated initially on economic regulation, where agencies like

the CAB and the ICC protected established airlines and motor carriers in the classic tradition of regulatory capture.¹⁸ Not surprisingly the Reagan administration, riding a wave of antigovernment sentiment, broadened the attack on government regulation. Like Carter, Reagan tightened White House control through OMB clearance and regulatory review councils. Unlike Carter, Reagan appointed to lead agencies like OSHA, the EPA, and the NHTSA a cadre of officials basically hostile to federal regulation.¹⁹ Under Carter the chief targets of deregulation were economic regulators -- the independent commissions and boards that generally protected established relationships and practices in the industries they regulated. Under Reagan the chief targets were social regulators, especially the environmental and consumer-protection agencies whose rules burdened industry with heavy compliance costs. The literature of regulatory reform, emphasizing cost-benefit analysis and market incentives, provided theoretical and technical support for reducing the excessive burdens of government regulation in transportation, energy production, communications, banking, environmental and consumer protection, worker safety -- everywhere except in civil rights regulation. For the past 20 years the literature of deregulation, including the pages of the Regulation, the leading journal of the deregulation movement, has explored reforms in both economic regulation and in social regulation of the environmental and consumer-protection variety, while largely ignoring civil rights regulation.²⁰

The omission of civil rights regulation from the regulatory literature should not surprise us; rather, its inclusion, prior to the mid-1990s, would have surprised us. One reason why is the unique moral dimension of civil rights debate. Civil rights policy is rooted in America's self-definition and lies at the heart of our long constitutional struggle over slavery, caste, and the subordination of religious groups, ethnic nationalities, and women. Prior to the 1970s, civil rights claims enjoyed a moral high ground challenged only by the dying claims of southern segregationists; if the Constitution was color-blind or sex-blind, then rights to equal treatment required enforcement, not regulation. The halo effect that surrounded civil rights issues during

the 1950s and 1960s was challenged during the late 1970s by reverse discrimination lawsuits culminating in the ambiguous Bakke decision of 1978. But in the Weber (1979) and Fullilove (1980) decisions the Supreme Court approved minority preference policies in industry and government contracting. Until the mid-1990s, the debate over group preference policies was either suppressed or transmuted into coded and unproductive exchanges over quotas.

Second, unlike regulation involving air and water pollution, wilderness preservation, or transportation and workplace safety, civil rights regulation does not lend itself to cost-benefit analysis. This was less true when civil rights enforcement was largely confined to nondiscrimination or the removal of barriers to participation by minorities and women. With few exceptions in civil rights regulation since the 1960s, however, most of them involving regulations for the handicapped (for example equipping public buses with wheelchair lifts), the economic consequences of government regulations involving school desegregation, voting districts, bilingual education, college and professional school admissions, and even minority goals and timetables in employment and minority set-asides in contracting, are exceedingly difficult to identify and measure.²¹ Too many nonquantifiable variables intervene between the costs of the behavior required by the regulator and the benefits derived by the advantaged parties.²²

The Politics of Regulation

Finally, and most pertinent for this analysis, civil rights regulation differs from the other forms of social regulation in the way outside interests are arrayed in the political environment. In James Q. Wilson's four-fold typology, the political environment surrounding most forms of environmental, consumer-protection, and transportation safety regulation is characterized by widely distributed benefits (clean air and water, safe drugs and highways) and narrowly concentrated costs (pollution abatement equipment, toxic waste disposal, air-bag requirements).²³ Wilson calls this pattern entrepreneurial politics, where regulation is popular with consumers and voters, but its

concentrated costs bring strong resistance from regulated industries. Social regulation of occupational health and safety, on the other hand, is characterized by interest-group politics, where both costs and benefits are highly concentrated. Thus for example OSHA is subject to competing pressures from rival interest groups -- organized labor seeking expensive improvements in the workplace environment and business firms resisting costs not tied to productivity. In these political environments, agency capture by regulated interests is difficult. In entrepreneurial politics, regulation cuts widely across industrial sectors (EPA, FDA, NHTSA); in interest-group politics, rival interests keep the agency erect (OSHA, NLRB).

In modern civil rights regulation, however, benefits (jobs, promotions, admissions, contract set-asides) are narrowly concentrated among protected-class clienteles (racial and ethnic minorities, women, the handicapped) while costs are widely distributed. Agencies in this environment face a dominant interest group or coalition of advocacy groups favoring agency goals. Wilson calls this client politics. The pattern is long familiar to us in the folklore of economic regulation, where regulated industries (railroads, shippers, airlines, motor carriers) captured "client agencies" (ICC, CAB, FCC, FMC). The mechanistic metaphors of agency capture and "iron triangles" have always oversimplified institutional and interest-group relationships, and space does not permit addressing that complexity here. Nonetheless the deregulation movement of the late 1970s built a formidable empirical case against the cozy environment of client protection found at agencies like the CAB and the ICC. Similarly by the 1970s, clientele groups representing the interests of minorities, women, the handicapped (the NAACP, Mexican American Legal Defense Fund, National Organization of Women, American Coalition of Citizens with Disabilities) lobbied intensively and effectively to shape the regulatory agenda of agencies like the EEOC, OFCC, Office for Civil Rights, Voting Rights Section in the Justice Department, Office of Bilingual Education and Minority Language Affairs, and their counterpart agencies in thousands of federal, state, county, and municipal governments.

The political power of advocacy groups within the civil rights enforcement agencies, backed by the effective lobbying of the Leadership Conference in Congress and generally supported by the federal courts into the middle 1980s, pushed the agencies to adopt aggressive compliance standards.²⁴ The OCR's desegregation guidelines and "Lau" remedies, the OFCC's Philadelphia Plan and Order No. 4, the EEOC's guidelines on employee selection procedures and race-normed test scores, the Justice Department's standards for minority-majority electoral districts, all intensified the level of public controversy. Agencies like the OCR, whiplashed between aggressive clientele groups, congressional oversight committees, federal courts in semi-permanent lawsuits like the Adams case, the political imperatives of presidential re-election, and shrinking budget resources, had difficulty pleasing any constituency. In a few celebrated instances (school desegregation guidelines for Mayor Daley's Chicago, school dress codes and hair-length codes, school-busing requirements for racial balance), OCR regulations were repudiated even by Democratic-controlled Congresses. In others (banning boys choirs and father-daughter school dinners), public ridicule forced bureaucratic retreat.²⁵ The reverse-discrimination controversies over Bakke and Weber in the late 1970s emphasized the spread of civil rights regulation well beyond the requirements of federal officials. The presidential election in 1980 of Ronald Reagan, running on a platform hostile to minority preference policies, promised to expand the deregulation movement to include civil rights enforcement.

The Reagan Counteroffensive Against Civil Rights Regulation

As a presidential candidate Ronald Reagan declared: "We must not allow the noble concept of equal opportunity to be distorted into federal guidelines or quotas which require race, ethnicity, or sex -- rather than ability and qualifications -- to be the principal factor in hiring or education."²⁶ Once elected, Reagan appointed conservatives to executive departments, regulatory agencies, and the federal bench and sought deregulation in voting rights law. At the end of his presidency Reagan's record on civil rights was attacked in

two books, one from the left and one from the right. In Civil Rights Under the Reagan Administration Norman Amaker, a civil rights lawyer and former NAACP staff member, described a reactionary effort to overturn settled law and policy; in Civil Rights Under Reagan Robert Detlefsen, an academic political scientist, described an indecisive administration, weakened by internal disagreement in the face of a hostile liberal Congress and a liberal federal judiciary. Both writers, however, agreed that Reagan had largely failed.⁷⁷

Reagan was most successful, especially during his first term when Republicans controlled the Senate, in appointing conservatives to the federal courts and to senior posts in the regulatory and mission agencies. The messy attempt to counter-capture the nonregulatory Civil Rights Commission partially backfired, but Reagan was more successful in curbing civil rights regulation at the EEOC and, to a lesser extent, at the OFCCP.⁷⁸ More significant however were three failed initiatives of the Reagan administration, two of them in Congress and one internal to the administration. First, during 1981-82 the civil rights coalition in Congress overwhelmed Reagan's initial attempt to narrow the scope of Justice Department regulation under the Voting Rights Act. As a result the voting rights amendments of 1982 extended for 25 years the Justice Department's preclearance authority, and declared in Section 2 that the discriminatory effects of electoral arrangements violated the act irrespective of their intent. Second, Congress overrode Reagan's veto of the Civil Rights Restoration Act of 1988, which reversed the Supreme Court's ruling in the Grove City College decision of 1984. In that decision the court held that agency regulations accompanying federal aid to public and private institutions applied only to the specific programs receiving the federal dollars (the college admissions office, a recipient of federal tuition aid), not to the entire institution. In both congressional defeats the Reagan administration faced a bipartisan coalition swollen by Republican defectors. Despite increasing conservatism among Republican leaders, party solidarity broke down on voting rights, where challenging the Leadership Conference invited charges of racism.⁷⁹ And in the Grove City College case, Reagan's

narrow view of regulatory jurisdiction unified the opposition of virtually all advocacy groups -- racial and ethnic minorities, feminists, the physically and mentally disabled, the immigration bar.

Third, the campaign to revise the affirmative-action executive orders, led during 1984-1985 by assistant attorney general for civil rights William Bradford Reynolds and supported by attorney general Edwin Meese, died in a quiet collapse in 1986. Leading the cabinet-level opposition to any fundamental change in Executive Order 11246 was Labor secretary William Brock, whose once lowly-regarded department had risen in status since 1965 largely on the two-fisted strength of the OFCCP and OSHA. Joining Brock in defending the affirmative-action status quo within Reagan's cabinet were the secretaries of State (George Shultz), Treasury (James Baker), Health and Human Services (Margaret Heckler), Transportation (Elizabeth Dole), and Housing and Urban Development (Samuel Pierce).³⁰ Their resistance reflected the reluctance of the nation's large employers to plunge into unknown waters. Strongly Republican and supporting deregulation elsewhere, big business preferred the known routines of underutilization analysis and minority hiring requirements to the unknown perils of reverse-discrimination suits.³¹

The Expansion of Civil Rights Regulation under the Reagan and Bush Administrations

By the mid-1980s, despite the Reagan counteroffensive, group preference policies had spread widely and were deeply entrenched in the political and administrative system. Contract set-aside programs, modeled on the ten-percent set-aside established by Congress in 1977 and upheld in the Supreme Court's Fullilove decision of 1980, spread rapidly throughout the nation's cities. By 1989, at least 234 jurisdictions -- states, cities, counties, and special districts -- had established set-aside programs. This included all the major cities that by 1990 had elected black mayors: Atlanta, Baltimore, Birmingham, Charlotte, Chicago, Cleveland, Denver, Detroit, Los Angeles, Memphis, Newark, New Orleans, New York, Richmond, Philadelphia, Seattle, and

Washington."²

Moreover, the Republican administrations under Reagan and Bush were not consistent in their opposition to race-conscious affirmative action. First, like Nixon and Ford, Reagan and Bush attacked racial quotas but courted African-American and Latino middle-class constituencies by offering minority earmarks and set-asides. During the 1980s both Republican presidents expanded earmarked aid to historically black colleges and increased set-aside requirements in agency budgets to support minority businesses. This included a 10 percent set-aside for highway construction in the Surface Transportation Assistance Act of 1982, and a 5 percent goal for defense procurement and research-and-development contracts in the 1987 National Defense Authorization Act. By 1990, federal agencies were awarding \$8.65 billion in minority set-aside contracts.³

Second, by the late 1980s Republican strategists had learned the partisan virtues of bipartisan support for strict voting-rights enforcement. Republican-led Justice Departments pressed successfully for minority-majority districts whose increasingly bizarre configurations offered three partisan advantages: they (1) modestly increased the election of minority Democrats, (2) rapidly increased the election of suburban white Republicans, and (3) sharply reduced the ranks of white Democrats.⁴ Finally, President George Bush, formerly chairman of Reagan's task force on regulatory relief, strengthened the government's comprehensive regulatory regime in civil rights by signing into law the Americans with Disabilities Act in 1990 and the Civil Rights Act of 1991.

The legislative effort culminating in the Civil Rights Act of 1991, which featured Bush vetoing a "quota bill" in 1990 and Congress reversing a brace of Supreme Court decisions led by Wards Cove, received far more attention than did the Americans with Disabilities Act (ADA). Yet both statutes are civil rights laws. When considered together, they teach us more about our regulatory state than we learn from inspecting the 1991 act alone. First, both major parties, not just the Democrats, have responded to the pressures of

client politics since the 1960s by supporting civil rights legislation to benefit well organized constituencies. The ADA, affecting an estimated 43 million Americans, dealt with the largest minority in the country and, according to the leading historian of disability policy, "the minority with the greatest propensity to vote Republican."³⁵ Disability cuts across lines of race, sex, class, and party, and rehabilitation emphasizes Republican virtues -- mainstreaming deserving individuals who sought self-improvement, turning them into tax-paying citizens. Although the ADA was a civil rights law, resting on the civil rights section of the Rehabilitation Act of 1973, which in turn was a clone of Title VI of the mother law of 1964, the ADA appealed to conservative Republicans who otherwise thundered against government regulation.

Second, in passing both civil rights laws, Congress continued the tradition of concentrating on rights and benefits while paying little attention to costs. The ADA contains provisions requiring special employment accommodations, nondiscrimination against physically and mentally disabled workers and students, access to all public and private transportation, and removal of architectural barriers -- provisions that carry enormous potential costs for private and government employers. Yet managers of the legislative hearings on the ADA, relying on assurances from President Bush and Attorney General Richard Thornburgh that the ADA would reduce Social Security payouts and increase tax revenues and consumer spending, decided not to introduce expert testimony on the cost-saving nature of the ADA.³⁶ Similarly the Civil Rights Act of 1991, by making available for the first time jury trials and compensatory and punitive damages in cases of intentional sexual and disability discrimination (including the ill-defined area of sexual harassment), provided economic incentives for litigation with potentially vast consequences.³⁷ Unfunded federal mandates, a staple of civil rights regulation, brought positive economic consequences to beneficiaries and employers alike during the 1960s and 1970s, when nondiscrimination destroyed barriers to the free flow of labor and talent. By the early 1990s the economic costs of civil rights

regulation, never a topic of much interest to Congress, remained largely unexplored.

Third, in the Civil Rights Act of 1991 the political branches of government on the eve of a presidential election responded to lobbying from a formidable array of civil rights constituencies (racial and ethnic minorities, women, the disabled) by enacting a law grounded in contradictory interpretations of the statute's meaning. Unable to agree on substantial policy questions, such as a statutory definition of "business necessity," Congress accompanied the act with several conflicting memoranda of interpretation. Congress and the White House could not agree on a statutory meaning, but could not resist passing the act anyway, while accompanying it with contradictory official explanations of what the new law meant. The federal courts would decide, by default.³ Finally, the civil rights legacy of 1990-91, by intensely engaging a national network of Washington-centered policy elites while drawing little on grassroots support from the general public, reflected a widening gap between the policy preoccupations of Washington and a souring national mood. This alienation is profound and its causes extend far beyond disagreement over civil rights.⁴ But unlike the 1960s, when the moral claims of protesting African Americans were unchallengeable, in the 1990s the American public is deeply divided in its passion over injustice.

The Tension Between Effectiveness and Legitimacy

As the web of government regulation has thickened since the 1960s, its requirements have grown nettlesome to citizens in areas far removed from civil rights policy. Increasingly government requires us to do this and not do that about auto emission testing, smoking, trash recycling, AIDS prevention, land use zoning, gun ownership, dog leashing, airport security. We are irritated by safety-belt contraptions we must buckle, by aspirin containers we cannot open, by the need to strap our children into back-seat harnesses and to buy and wear bicycle and motorcycle helmets. And we grumble about their necessity or wisdom or design. But we do not, as a rule, question the legitimacy of

government responsibility for clean air and water or safe transportation and consumer products. My argument is that the standard-setting, rule-making model of social regulation that won acceptance during the 1960s and 1970s to reduce risk and harm from environmental, consumer, and safety hazards was unable to win public acceptance when it is was used to enforce civil rights policy. The story of Title VI of the Civil Rights Act, as it was reshaped over three decades by enforcement agencies and federal courts to require or encourage minority preferences, is a story of increasing effectiveness, of institutionalized political security, purchased at the price of decreasing public legitimacy.

Supporters of civil rights regulation under the disparate impact standard offer powerful arguments the affirmative-action regime developed since 1964 has been pro-active, administratively flexible, effective when measured by economic outcomes, increasingly accepted by Congress, and preferred to unknown alternatives by employers.⁴⁰ And they are right. Critics, however, have replied that the affirmative-action regime is permanent regulation with a temporary rationale, exercised by captured agencies in the interest of selected clientele groups, with benefits accruing to advantaged parties,⁴¹ including millions of recent immigrants with no claims to past discrimination. And they are right. There is enough truth on both sides of this accounting ledger to sustain indefinitely the crippling polarization over civil rights policy that grips our society. Since the beginning of the Nixon administration the civil rights coalition has won most of the battles over establishing and defending a regulatory regime of affirmative action preferences. Unlike the nondiscrimination principles of 1964, however, and unlike social regulation to protect consumers, worker safety, and the environment, affirmative-action regulation has been rejected by most Americans as unfair.

In 1985, Democratic pollster Stanley Greenberg reported growing disaffection in Michigan among white working-class voters over minority job preferences. Subsequent national surveys by Gallup, ABC News-Washington Post, the University of Michigan's Institute for Social Research, and NBC News-Wall

Street Journal showed growing resentment of affirmative action among whites of both sexes.⁴² When a New York Times poll asked a national sample of respondents in May 1985 if they favored preference in hiring or promotion for blacks in areas where there had been discrimination in the past, 42 percent said yes and 46 percent said no. Asked the same question in December 1990, 32 percent said yes and 52 percent said no.⁴³ When a 1990 survey by the Times-Mirror Corporation asked a national sample of more than 3,000 people whether they agreed that "we should make every possible effort to improve the position of blacks and other minorities, even if it means giving them preferential treatment," white men disagreed by a margin of 81 to 16 percent. White women, who comprise 40 percent of the U.S. voting population, and who have benefitted greatly from nondiscrimination policy since the 1960s and relatively little from gender preferences under affirmative action, agreed with the opinion of white men.⁴⁴ A study commissioned in 1990 by the Leadership Conference found that white voters typically saw civil rights proposals as expressing the narrow concerns of particularized groups instead of promoting a broad policy opposing all forms of discrimination. Using a national poll and focus groups, the investigators did not find intensified racism but did find strong opposition to discriminatory practices based on race, gender, age, or disability.⁴⁵

In The Scar of Race, Paul Sniderman and Thomas Piazza, using experimental interview techniques to explore the dimensions of white racial prejudice, found that white attitudes toward blacks were diverse and pliable. Although white racial prejudice was still manifest in poll results, in housing patterns, and in school resegregation, it is "simply wrong," they found, "to suppose that the primary factor driving the contemporary arguments over the politics of race is white racism."⁴⁶ By increasing margins whites supported not only government policies banning deliberate discrimination based on race, but also government programs to provide income, services, and training to improve the economic and social circumstances of blacks. On issues of school busing for racial balance and affirmative-action preferences, however, white Americans of both sexes are massively opposed.⁴⁷ As the regulatory state has

extended its reach and increased its intrusiveness, it has met stiffest resistance in the one area where the efficiency of modern social regulation has clashed with a core conviction of most Americans that individuals should not be harmed, especially by their government, on the basis of characteristics they were born with.

As affirmative action programs have spread to new constituencies since 1970 and developed strong defenses in the coalitions of client politics, the moral authority of the civil rights movement has grown progressively weaker. The gains for minorities in economic status, coalition strength, and congressional consensus have been offset by a massive alienation among white Americans, joined increasingly by Asian Americans. The polarization, in an atmosphere of increasing economic insecurity, poisons our political life. Recently, and controversially, the federal courts have engaged the thorny issues of civil rights regulation -- especially in Croson, Dowell, Shaw, and most recently in Adarand Contractors v. Pena, Missouri v. Jenkins, and Taxman v. Piscataway. The history of civil rights policy since 1964 offers useful lessons about how we got into our present fix, including the role of the federal judiciary in getting us there. Unfortunately, it contains far fewer lessons about how to get us out.

ENDNOTES

1. David Vogel, "The 'New' Social Regulation in Historical and Comparative Perspective," in Thomas K. McCraw, ed., Regulation in Perspective (Cambridge: Harvard University Press, 1981), 155-86.
2. Advisory Commission on Intergovernmental Relations, Categorical Grants: Their Role and Design (Washington: U.S. Government Printing Office, 1978), 15-31. In 1990 dollars, federal aid to state and local governments increased from \$4.7 billion in 1946 to \$20.5 billion in 1963.
3. James L. Sundquist, Making Federalism Work (Washington: Brookings Institution, 1969), 12.
4. Michael D. Reagan, "Federal-State Relations During the 1960's: Unplanned Change," in Lawrence E. Gelfand and Robert J. Neymeyer, eds., Changing Patterns in American Federal-State Relations During the 1950's, the 1960's, & the 1970's (Iowa City: University of Iowa Press, 1985), 31-48.
5. Prior to the New Deal most federal grants supported agricultural experiment stations and extension, forestry management, vocational education, and rural highway building. Congress as early as 1892 limited working hours for laborers and mechanics employed on public work by the U.S. government and its contractors and subcontractors. In 1931 the Davis-Bacon Act rewarded organized labor by requiring federally-assisted contractors to pay the "prevailing wage" in their area. Prior to the 1960s, however, most federal "strings" or controls accompanying grants programs, such as those governing hospital construction and airports and interstate highways, concerned technical requirements.
6. The Powell amendment, which would terminate federal funds to federally assisted programs practicing racial discrimination, was frequently proposed by Harlem congressman Adam Clayton Powell as an amendment to otherwise popular federal aid bills in the House. Customarily opposed by a coalition of southern Democrats and conservative Republicans in Congress, the Powell amendment often drew enough opposition to defeat the bill to which it was attached, yet voting against it in order to save the bill was difficult for representatives from urban districts and industrial states. See Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy 1960-1972 (New York: Oxford University Press, 1990), 76-83.
7. Civil Rights Act of 1964 (Washington: Bureau of National Affairs, 1964), 115-16.

8. Federal efforts to promote job desegregation in the South reach back to Roosevelt's wartime FEPC and achieved some success under the leadership of Vice President Lyndon Johnson during the Kennedy administration. See Graham, Civil Rights Era, 47-73.
9. Charles and Barbara Whalen, The Longest Debate (Cabin John, Md.: Seven Locks Press, 1985); Gary Orfield, The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act (New York: Wiley-Interscience, 1969), 35-46.
10. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 404 U.S. 854 (1971); Griggs v. Duke Power Co. 401 U.S. 424 (1971).
11. Hugh Davis Graham, Civil Rights and the Presidency (New York: Oxford, 1992), especially 150-69.
12. Thomas Byrne Edsall with Mary Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics (New York: Norton, 1991).
13. U.S. Advisory Commission on Intergovernmental Relations, Regulatory Federalism: Policy, Process, Impact, and Reform (Washington: ACIR, 1984), 70-91. In 1970, Hispanic advocacy groups persuaded the Office for Civil Rights under its Title VI authority to issue the "May 25 Memorandum" requiring federally-aided school districts to provide bilingual education plans. On the ensuing controversy, including the Lau regulations published by the newly created Department of Education under Secretary Shirley Hufstедler in 1980, see Coleman Brez Stein, Jr., Sink or Swim: The Politics of Bilingual Education (New York: Praeger, 1986), 36-44.
14. U.S. Advisory Commission on Intergovernmental Relations, Federal Regulation of State and Local Governments: The Mixed Record of the 1980s (Washington: ACIR, 1993), 9.
15. On Section 504 see Richard K. Scotch, From Goodwill to Civil Rights (Philadelphia: Temple University Press, 1984); Edward D. Berkowitz, Disabled Policy: America's Programs for the Handicapped (New York: Cambridge University Press, 1987).
16. Martha Derthick, "Intergovernmental Relations in the 1970s," in Gelfand & Neymeyer, Changing Patterns in American Federal-State Relations, 54-59.
17. ACIR, Categorical Grants, 287-293; ACIR, Regulatory Federalism, 10-18.
18. Susan Tolchin, "Presidential Power and the Politics of RARG," Regulation 3 (1979): 44-49; Martha Derthick and Paul J. Quirk, The Politics of Deregulation (Washington: Brookings

Institution, 1985).

19. Jeremy Rabkin, "The Reagan Revolution Meets the Regulatory Labyrinth," in Benjamin Ginsberg and Alan Stone, eds., Do Elections Matter? (Armonk, N.Y.: M.E. Sharpe, 1986), 221-39.

20. Founded in 1977 under the auspices of the American Enterprise Institute, Regulation ranges widely across the fields of trade, antitrust, economic regulation (securities, banking and thrifts, power, communications, transportation), and social regulation (acid rain, drugs, endangered species, clean air) while almost entirely avoiding civil rights regulation. The rare exceptions include handicapped regulation under Sec. 504 and public law litigation over the enforcement policies of the OCR. See John Earl Haynes, "Democracy and Due Process: The Case of Handicapped Education," Regulation 6 (November/December 1982): 29-34; and Jeremy Rabkin, "Captive of the Court: A Federal Agency in Receivership," Regulation 8 (May/June 1984): 16-26.

21. Civil rights regulation has been challenged on economic grounds by Thomas Sowell, Markets and Minorities (New York: Basic Books, 1981); Sowell, The Economics and Politics of Race (New York: William Morrow, 1983); and by Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (Cambridge: Harvard University Press, 1992).

22. The classic theoretical work is Gary S. Becker, The Economics of Discrimination (Chicago: University of Chicago Press, 1957). For recent economic analysis of the economic impact of affirmative-action policies, see Jonathan Leonard, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," Journal of Economic Perspectives 4 (Fall 1990): 49-70; John J. Donohoe III and Joseph Heckman, "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks," Journal of Economic Literature 29 (December 1991): 1603-43; Walter Y. Oi, "Work for Americans with Disability," Annals 523 (September 1992): 159-74.

23. James Q. Wilson, Bureaucracy (New York: Basic Books, 1989), 72-89; Wilson, Politics of Regulation, 357-94.

24. The Warren court, developing the public law model following the Brown decision, played a major role in the regulatory expansion of the 1960s. Under the Burger court federal judges became routinely engaged in enterprises normally undertaken by the executive and legislative branches of government -- for example managing school desegregation efforts, restructuring school districts, revamping prisons and jails, relocating public housing, reforming mental institutions, mediating environmental disputes. The role of the federal courts in upholding and, at times, accelerating the development of affirmative-action regulation has been widely discussed in the legal and civil rights

literature. See for example Alfred W. Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity (Madison: University of Wisconsin Press, 1993).

25. Joseph A. Califano, Governing America (New York: Simon & Schuster, 1981), 219-26.

26. Quoted in Gary L. McDowell, "Affirmative Inaction: The Brock-Meese Standoff in Federal Racial Quotas," Policy Review 48 (Spring 1989): 32.

27. Norman C. Amaker, Civil Rights and the Reagan Administration (Washington: The Urban Institute, 1988); Robert R. Detlefsen, Civil Rights Under Reagan (San Francisco: Institute for Contemporary Studies, 1991). Views similar to Amaker's are found in Walton, When the Marching Stopped. Detlefsen's disappointment in the Reagan record is echoed in Belz, Equality Transformed.

28. Blumrosen, Modern Law, 267-74; Belz, Equality Transformed, 181-207.

29. Hugh Davis Graham, "Voting Rights and the American Regulatory State," in Bernard Grofman and Chandler Davidson, eds., Controversies in Minority Voting (Washington: Brookings Institution, 1993), 177-96.

30. Newsweek, 30 December 1985; Daniel Seligman, "It Was Forseeable," Fortune, 22 July 1985; McDowell, "Affirmative Inaction," 32-37. According to these sources, Meese was supported by the secretaries of Education (William Bennett), Energy (John S. Herrington), Interior (Donald P. Hodel), and the director of the OMB (James C. Miller III).

31. Daniel Seligman, "Affirmative Action is Here to Stay," Fortune, 19 April 1982; Anne B. Fisher, "Businessmen Like to Hire by the Numbers," Fortune, 16 September 1985; Steven A. Holmes, "Affirmative Action Plans are Part of Business Life," New York Times, 22 November 1991.

32. George R. LaNoue, "Split Visions: Minority Business Set-asides," Annals of the American Academy of Political and Social Science 523 (September 1992): 104-16.

33. Mark Eddy, Federal Programs for Minority and Women-Owned Businesses (Washington: Congressional Research Service, 1990). By 1990 the set-aside pattern for minority and firms and persons designated "socially and economically disadvantaged" was common throughout the federal government - 10 percent of international development grants, 8 percent of National Aeronautics and Space Administration contracts, 10 percent of the construction value of U.S. embassies abroad, 10 percent of the construction and operating costs of the Superconducting Super Collider.

34. New York Times 14 February 1994, 16 April 1994, 17 August 1994.

35. Edward D. Berkowitz, "A Historical Preface to the Americans With Disabilities Act," Journal of Policy History 6 (1994): 109, 96-119.

36. *Ibid.*, 113.

37. David A. Cathcart et al., The Civil Rights Act of 1991 (Philadelphia: American Law Institute - American Bar Association, 1991).

38. Cathcart et al., Civil Rights Act of 1991, 8; Henry H. Perritt, Jr., Civil Rights Act of 1991: Special Report (New York: Wiley, 1992), *passim*.

39. According to the University of Michigan's National Election Study data, in 1964 76 percent of Americans thought that "Washington can be trusted to do what is right" all or most of the time. In 1992 only 24 percent shared that view. Frank Luntz and Ron Dermer, "A Farewell to the American Dream?" The Public Perspective (September/October 1994): 12-14.

40. See for example Herbert Hill and James E. Jones, Jr., eds., Race in America: The Struggle for Equality (Madison: University of Wisconsin Press, 1993).

41. The argument that affirmative-action preferences have chiefly benefitted advantaged individuals and firms rather than the most vulnerable minorities and women is documented in a substantial literature. See for example Paul Burstein, Discrimination, Jobs, and Politics (Chicago: University of Chicago Press, 1985); William Julius Wilson, The Truly Disadvantaged (Chicago: University of Chicago Press, 1987); David M. O'Neill and June O'Neill, "Affirmative Action in the Labor Market," Annals 523 (September 1992): 88-103.

42. Seymour Martin Lipset, "Equal Chances versus Equal Rights," Annals 523 (September 1992): 63-74; Lipset, "Affirmative Action and the American Creed," Wilson Quarterly (Winter 1992): 52-62. According to Lipset, whites overestimate the extent of reverse discrimination; blacks on the other hand underestimate the extent of black economic progress--"due in part to the reluctance of black leaders to admit it" ("American Creed," p. 60).

43. Peter Applebome, "Rights Movement in Struggle for an Image as Well as a Bill," New York Times, 3 April 1991.

44. Peter A. Brown, "Ms. Quota," New Republic, 15 April 1991, 18-19.

45. Thomas Byrne Edsall, "Rights Drive Said to Lose Underpinnings," Washington Post, 9 March 1991.

46. Paul M. Sniderman and Thomas Piazza, The Scar of Race (Cambridge, Mass.: Belknap Press, 1993), 5.

47. Sniderman and Piazza report that surveys reporting attitudes in Australia, Germany, Italy, and the United Kingdom toward giving women preferential treatment for jobs and promotions showed massive opposition. "Proposing to privilege some people rather than others, on the basis of characteristics they were born with," Sniderman and Piazza observe, "violates a nearly universal norm of fairness." Scar of Race, 134.

Mr. CANADY. Dr. Berry.

**STATEMENT OF DR. MARY FRANCES BERRY, CHAIRPERSON,
U.S. COMMISSION ON CIVIL RIGHTS**

Dr. BERRY. Thank you very much, Mr. Chairman.

I did not know until this morning that this was a panel of non-governmental witnesses, so I have written testimony which I prepared in my capacity as chair of the Civil Rights Commission, which I ask that you include in the record, please.

Mr. CANADY. Without objection.

Dr. BERRY. But I intend to speak in terms of my own views as the Geraldine R. Segal Professor at the University of Pennsylvania. I know Hugh Graham very well. He is from Nashville, TN, like I am.

I appointed him to chair an important committee when I was elected president of the OAH, the Organization of American Historians. My view of what transpired in the history of affirmative action is very different from his; in particular, my view of what happened in the Nixon administration is different.

I served in the Nixon administration, which might surprise you, and was involved in figuring out how to apply affirmative action to higher education, and I was also involved in the ombudsman program that Nixon established to investigate claims of reverse discrimination.

In the Nixon administration, we implemented goals and time tables to measure performance, not quotas. We did it because of the discrimination which existed and which was not eradicated by simply passing laws and saying that in fact, nondiscrimination was the rule. I left the Nixon administration because a university, which happens to be in New York City, hired an assistant vice president without recruiting and going through the affirmative action process and tried to palm him off as the best qualified. They didn't know that I knew him because he was a professor who was denied tenure at a university where I happened to have been. So when he showed up, the game was up. Anyway, I have more to say.

Affirmative action is only one among various approaches to relieving inequity and empowering people. I am aware that we need better education, and there is eradicating the drug problem, combating crime, and all sorts of things that I would be happy to talk about here. These are major priorities. But what we are discussing is whether we should abandon the principle that race and gender exclusion must be dealt with by positive efforts toward inclusion, because it is right and because it is good for the Nation's future.

Now, my preaffirmative action reality may be a little different from Professor Graham's. It included thousands of towns and cities in which police departments and fire departments were all white male, and women and African-Americans couldn't even apply. In grocery and department stores, all the clerks were white and the janitors and the elevator operators were black or Hispanic, or something.

Generations of African-Americans swept the floors in factories, including one in Nashville where my relatives for three generations swept the floors while being denied the opportunity to become higher-paid operatives on the machines. And college-educated African-

Americans, including some in my family, worked as bellboys and porters and domestics if they couldn't get a job teaching at the all-black school, which was usually the only alternative to preaching or perhaps working in the post office.

There were no merit standards for employment for the white males who got the best jobs, because merit requires accepting applications from everybody and picking the best people. Men with the privilege of white skin, whether their granddaddies ever owned slaves or not, whether late- or early-coming immigrants, had the whole good-job pie all to themselves.

Preferences have been given to white males without regard to qualifications, but I can find no examples of any of them ever turning down a job or a business opportunity or calling a press conference to complain that merit standards had not been applied, and I have researched the history on this. That is the past I know, not a past of gender and race neutrality.

The 10 million workers on the payrolls of the 100 largest defense contractors included few blacks. The \$7.5 billion in Federal grants in aid to the States and cities for highway, school, and airport construction went almost exclusively to whites.

And the U.S. Employment Service gave funds to State-operated bureaus which encouraged skilled African-Americans to register for unskilled jobs and accepted requests from lily-white employers and made no efforts to get employers to accept African-Americans. Essentially, the Government, in part using taxes paid by black folk, was directly subsidizing discrimination. Not much happened after the civil rights laws were passed, and that is why, under the prodding of the U.S. Civil Rights Commission and under the leadership of Art Fletcher and other people, the Nixon administration implemented goals and timetables for affirmative action—not quotas, but goals and timetables. Also, title VII of the Civil Rights Act was amended so that you could have affirmative action under it.

Now, affirmative action has been important in alleviating unequal opportunity for women, for wives and daughters and sisters who can, in fact, have better opportunities than they would before, including African-Americans and other people of color. Women are now 50 percent of undergraduate students and 50 percent or more of students in law and medical and other graduate professional schools.

The greatest impact of affirmative action took place in the late 1960's and the early 1970's before enforcement and public interest lagged. My history here is different from Hugh Graham's. By 1976, backlash ensued. In the 1980's, of course, it was a period of stagnation.

I want to tell you that, contrary to the headlines, this controversy over affirmative action is not new. For its entire history it has been subjected to attack. Opponents distort the meaning and try to rewrite history. I want to say, too, that when opponents claim that affirmative action requires a lowering of standards, pointing to standardized test scores, they can't be serious. Neither black folks nor non-Jewish whites make the highest test scores.

If opportunity were awarded on the basis of test scores, Asians and Jewish-Americans would hold the best jobs everywhere and populate almost entirely the best colleges and universities in this

country, since they uniformly make the highest standardized test scores.

I realize that the economy—and I will be finished in a minute—is creating all kinds of problems for people and that they are looking for scapegoats to try to solve their problems. All I can say to you is there are some people who say we ought to use economic disadvantage and that will solve the problem. Race and sex discrimination is one thing. Poverty is another. And we ought to have efforts to relieve all of these. So therefore, I believe that we ought to continue affirmative action programs.

There are abuses. I have been here previously in the Congress testifying in hearings several times on the abuses of affirmative action and set-asides. I have been in the small business committee and I have been in this committee testifying. And the Congress has enacted legislation to try to deal with the abuses.

If there are abuses, let us fix them. Let us continue to fix them. But let us not answer the question by saying that we are going to polarize the country through affirmative action. The country was polarized before anyone ever heard of affirmative action.

If there is anything else anyone wants to ask me, I would be pleased to answer any questions you might have.

Thank you, Mr. Chairman.

[The prepared statement of Dr. Berry follows:]

PREPARED STATEMENT OF DR. MARY FRANCES BERRY, CHAIRPERSON, U.S.
COMMISSION ON CIVIL RIGHTS

Mr. Chairman and members of the Subcommittee, I am pleased for this opportunity to testify today on the topic of affirmative action.

The Commission has conducted, in the past, and is planning for later this spring, hearings on this very important issue. Before turning my comments to affirmative action, allow me to describe briefly the work of the Commission and its present composition.

As an independent, bipartisan, factfinding agency of the Federal Government, the Commission is mandated to collect, study and publish information concerning the denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or the administration of justice. The Commission reports its findings and recommendations to the President and the Congress. Last fall, the Congress added to the Commission's duties, the obligation to issue public service announcements and advertising campaigns to educate our nation's citizens on denials of equal protection of the laws under the Constitution and to discourage discrimination.

My colleagues on the Commission represent a diverse range of backgrounds, views and talents. They are: Vice Chairperson Cruz Reynoso, Professor of Law at the UCLA Law School; Carl A. Anderson, Vice President for Public Policy for the Knights of Columbus, and Dean and Professor of Family Law of the North American Campus of the Pontifical John Paul II Institute for Studies on Marriage and Family; Arthur A. Fletcher, President and CEO of Fletcher's Learning Systems, and Publisher of USA Tomorrow/The Fletcher Letter; Robert P. George, Associate Professor of Politics at Princeton University; Constance Horner, Guest Scholar in Governmental Studies, Brookings Institution; Russell G. Redenbaugh, Partner and Director of Cooke & Bieler, Inc., and Chairman and CEO of Action Technologies, Inc.; and Charles Pei Wang, Chairman, Asian American Council for Economic Development, Inc., and Secretary, United Way of New York City.

Because the Commission is an independent, bipartisan agency, my remarks on behalf of the Commission do not necessarily reflect the views of the Administration. Moreover, each member of the Commission has his or her own viewpoint on the civil rights issues that confront us;

however, we share the common goal of eradicating unlawful discrimination and ensuring equal opportunity to all Americans. I, in particular, want to emphasize that although as a matter of history, the civil rights laws were passed to provide coverage to those Americans who lacked protection, the civil rights laws protect all Americans. That protection, of course, extends to everyone including white males.

The Commission has long been involved in studying and assessing the propriety and efficacy of various remedial measures, including affirmative action, to eliminate discrimination. The Commission has previously defined affirmative action as "active efforts that take race, sex, and national origin into account for the purpose of remedying discrimination." It is "a term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future." U. S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*, Clearinghouse Pub. No. 70, at 2 & n.6 (November 1981).

While the Commission has not adopted a position in the current debate surrounding affirmative action, it has previously supported affirmative action policy, properly construed, as an effective tool to correct past and present discrimination. Throughout, however, the Commission has remained steadfast in its opposition to the use of "quotas" by employers and colleges and universities, while equally tenacious in its support of "goals and timetables." See, e.g., U. S. Commission on Civil Rights, *Report of the United States Commission on Civil Rights On the Civil Rights Act of 1990* (Jul. 1990).

The Commission first addressed the issue of affirmative action for equal employment opportunities in 1973. U. S. Commission on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* (1973). There, the Commission expressed its view that "[t]he necessity for goals and timetables arose out of long and painful experience in which lip service to equal employment opportunity was paid by employers who then did little to correct the situation." In 1978, the Commission studied affirmative action more broadly, as applied in employment, federal contracting, and professional schools. U.S. Commission on Civil Rights, *Statement on Affirmative Action*, Clearinghouse Pub. No. 54 (October 1977). Again, the Commission concluded that "[t]he short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity." *Id.* at 12. The Commission acknowledged that "[t]he aspiration of the American people is for a 'colorblind' society, one that 'neither knows nor tolerates classes among citizens.' But," the Commission concluded, "color consciousness is unavoidable while the effects persist of decades of governmentally-imposed racial wrongs. A society that, in the name of the ideal, foreclosed racially-conscious remedies would not be truly color-blind but morally blind." *Id.*

Similarly, in 1981, the Commission noted that "[w]hen discrimination is widespread and entrenched, it becomes a self-regenerating process capable of converting what appear to be neutral acts into further discrimination." U. S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*, Clearinghouse Pub. No. 70, at 2

(November 1981). Under such circumstances, the Commission concluded that "antidiscrimination remedies that insist on 'color blindness' or 'gender neutrality' are insufficient." *Id.*

In the field of education, the Commission's early studies sanctioned affirmative action for minority students. The Commission found that "given the long and lamentable history of discrimination against minorities in higher education, consideration of race or minority status in the admissions process of law and medical schools is certainly justified and appropriate." U. S. Commission on Civil Rights, *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools*, Clearinghouse Pub. No. 55 (June 1978). This position was echoed in 1991 following the announcement by the Education Department's Office for Civil Rights that Title VI of the Civil Rights Act of 1964 barred funding of minority-targeted scholarships by institutions receiving Federal financial assistance. The Commission voiced its opposition to the previous Administration's interpretation of Title VI and urged President Bush "to take a strong stand in support of affirmative action in the recruitment of minority students, including the use of minority-targeted scholarships where necessary to achieve either of two important national interests -- remedying the invidious effects of discrimination and attaining the benefits of a diverse student body." Letter to Hon. George Bush, President of the United States, from Hon. Arthur A. Fletcher, Chairperson, U. S. Commission on Civil Rights (Jan. 23, 1991).

In 1985, the Commission conducted a consultation on selected affirmative action topics in employment and business set-asides designed in part to determine whether "underrepresentation or underutilization in employment should trigger a finding of discrimination and affirmative action." U. S. Commission on Civil Rights, *Selected Affirmative Action Topics in Employment and Business Set-Asides*, vol. 2, March 6-7, 1985 (opening statement of Hon. Clarence Pendleton, Chairman). Just three years ago, the Commission conducted a forum in Denver, Colorado "to gather information about alleged discrimination against minorities and women in obtaining economic contracts and employment opportunities at the multibillion dollar Denver International Airport [then] under construction." U. S. Commission on Civil Rights, *Constructing Denver's New Airport: Are Minorities and Women Benefiting?*, Clearinghouse Pub. No. 97 (July 1992).

Our subsequent evaluation of selected aspects of civil rights enforcement by the Departments of Transportation and Labor uncovered a broad range of deficiencies in the implementation of both departments' mandate to administer civil rights policies. The study further confirmed that enforcement of Title VI regulations to recruit women and minorities for inclusion in economic opportunities in connection with the Denver Airport was inadequate. "Without effective civil rights enforcement," the Commission concluded, "minorities and women will not have equal opportunities to benefit from the jobs and economic growth stimulated by these Federal programs, as guaranteed by our Constitution." A Report of the U.S. Commission on Civil Rights, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs Relating to Federally Assisted Transportation Projects*, transmittal letter (Jan. 1993).

The Commission's concern with opening doors and eliminating barriers to employment opportunities for women and minorities was also expressed during the National debate on the Civil Rights Act of 1990. The Commission issued a report in 1990 enumerating what was in its view the necessary elements of a model civil rights act. There, we encouraged Congress to incorporate into the proposed Civil Rights Act language that would clarify that that legislation was not intended to promote employment quotas or to condone their usage as a means of avoiding liability in disparate impact cases. See *Report of the U. S. Commission on Civil Rights On the Civil Rights Act of 1990* (July 1990). Following the veto of the 1990 act by President Bush, the Commission continued to weigh in on the debate, voicing its support for "the 20 years of experience which supports the notion that the employer must show 'business necessity' in order to uphold practices that keep women and minorities out of the workplace." Letter to Hon. George Bush, President of the United States, from Hon. Arthur A. Fletcher, Chairperson, U. S. Commission on Civil Rights (Oct. 21, 1991).

Since these reports of the Commission, much has changed, and yet, sadly, much has remained the same. This Nation has made great strides in addressing, through legislation, discrimination based on color, race, religion, sex, age, disability and national origin. Unhappily, however, evidence of discrimination against women and minorities persists. While statistical underrepresentation is not equivalent to discrimination, such disparities pinpoint areas in which discrimination may be occurring. The recent report of the Glass Ceiling Commission found three levels of continuing artificial barriers -- societal, internal and governmental -- to the advancement of women and minorities in corporate management. Lingering racial and gender stereotypes, internal recruitment policies, and poor government enforcement of antidiscrimination in employment, independently and in combination, impede advancement of qualified women and minorities in the corporate sector. The Glass Ceiling Commission found that workers tend to be clustered in industries on the basis of sex more than race. For example, almost 75 percent of working women in the corporate sphere are employed in service industries such as finance, insurance and real estate and the wholesale and retail trades.

The Urban Institute, in 1989 and 1990, conducted studies in which it found that discrimination against African-American and Hispanic jobseekers is entrenched and pervasive. In the studies, recent college graduates of different races but similar job qualifications, dress, poise and personality were enlisted to test hiring practices in several industries in Washington, D.C., Chicago, and San Diego. Both studies, concluded that African Americans and Hispanics were systematically denied equal opportunity in the hiring process.

Since the Urban Institute studies, testing evidence has been used to support law suits filed by the NAACP against Lord & Taylor and by the Fair Employment Council of Greater Washington against BMC Marketing Corporation. That discrimination continues to plague our society is punctuated by significant settlements in litigation against State Farm Insurance, Lucky Stores, Denny's and Shoney's restaurant chains. The overwhelming evidence that discrimination remains widespread underscores the need to ensure effective remedies if this Nation is to advance the cause of equality and opportunity for all.

Affirmative action has been one tool designed to remedy the effects of past discrimination against women and minorities or to diversify a particular entity. The legality of affirmative action plans or legislation has been the subject of over a dozen Supreme Court cases since the concept was first introduced in 1961. In response to those challenges, the United States Supreme Court has structured a number of limitations and safeguards on the operation of such plans. Presently, State and local affirmative action plans are subject to a different standard of judicial review than are those enacted by Congress. Similarly, race-conscious affirmative action plans are subject to a higher standard than are gender-conscious affirmative action plans. Additionally, all governmental affirmative action plans generally are subject to the strictures of the Fourteenth or Fifth Amendments, and may be governed by applicable civil rights laws as well, while affirmative action plans of private employers are evaluated chiefly under the civil rights laws. Within these parameters, the Supreme Court has indicated that affirmative action is lawful in the following contexts:

- Court imposed remedies may include affirmative measures following a finding of unlawful discrimination under the Constitution, *see Brown v. Board of Educ. II*, 349 U.S. 294 (1955); *Brown v. Board of Educ. I*, 347 U.S. 483 (1954), or the Civil Rights laws, *see Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986), and thus, may be properly imposed against both private and public actors.
- Private and public employers may voluntarily institute affirmative action plans, consistent with Title VII of the Civil Rights Act of 1964, to remedy a conspicuous imbalance in a traditionally segregated job category within its workforce if the plan is temporary and does not unnecessarily trammel the interests of nonminorities, *see United Steel Workers of America v. Weber*, 443 U.S. 193 (1979), or males. *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987).
- State and local governments may adopt and implement affirmative action plans narrowly tailored to correct the effects of past discrimination in which the specific governmental entity subject to the plan participated. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
- Congress may implement affirmative action measures to redress societal discrimination, *see Fullilove v. Klutznick*, 448 U.S. 448 (1980), or to promote diversity. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990).

In short, the test of affirmative action programs is whether they are calculated to achieve their legitimate ends and whether they do so in a manner that deals fairly with the interests of all Americans.

Voluntary affirmative action measures together with private litigation have resulted in broadened opportunities for women and minorities even in the absence of strong, vigorous, and effective enforcement of the civil rights laws. Nevertheless, the government has a responsibility to exert leadership in alleviating invidious discrimination.

President Clinton, as did President Reagan over a decade ago, has convened a task force to review governmental affirmative action programs. *See Affirmative Action in the 1980's*, at 4. New and old challenges have been voiced in opposition to the continuation of affirmative action. Seldom do these challenges reflect, however, the variety of contexts and ways in which affirmative action is applied.

The Commission has prepared a briefing paper that provides a historical summary of the manner in which affirmative action has been referenced, implemented or interpreted within the Executive, Legislative and Judicial branches of the government. This document, which will be made available to all members of Congress and other organizations, may be useful in establishing the parameters within which reasoned debate may occur.

In furtherance of our statutory obligation, the Commission intends to exercise its authority to conduct hearings to provide the necessary factual basis for assessing the critical issue of continuing discrimination and the remedial efficacy of affirmative action plans and policies.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions you might have.

Mr. CANADY. Ms. Chavez.

**STATEMENT OF LINDA CHAVEZ, PRESIDENT, CENTER FOR
EQUAL OPPORTUNITY**

Ms. CHAVEZ. Thank you, Mr. Chairman. It is a pleasure to be here and it is also a pleasure to be with my former colleague, Mary Frances Berry.

I was surprised to learn, Dr. Berry, that you had worked for Richard Nixon back in the early 1970's. When you were working for Richard Nixon, I was working for the Democratic chairman of this committee, Don Edwards.

It seems we are destined for all of our lives to be on opposite sides of the issue. Clearly, the history as outlined by Dr. Graham and the history outlined by Dr. Berry both has tremendous merit, and I want to first and for the record, to state that I support a vigorous enforcement of our antidiscrimination laws and I also support the notion of affirmative action as it was understood back in the early 1970's, that is the recruitment of qualified minorities and women and the provision of training and skills to those who could not yet meet the criteria to compete solely on merit.

The problem is that affirmative action has transmogrified during the last 25 years, and it is my view that affirmative action today bears little resemblance to the affirmative action programs 20 years ago. There is a widely-held perception, and I think it is a perception based on reality, that affirmative action applies different, dual standards to persons applying for jobs, applying for entry into universities, applying for promotions based on the race, ethnicity and gender of the applicant.

Now, I say this is based on reality. We do know that from 1981 to 1991, the Government had a system of race-norming standardized tests that were used by employers throughout the United States, and every year during that decade, about 3 million persons were hired on the basis of standardized test scores that had been race normed.

It is interesting to note, in light of what Dr. Berry said and also in light of what Dr. Graham said about Republican administrations, that this occurred under a series of Republican administrations. Now, race-norming, as you all know, was outlawed by the 1991 Civil Rights Act, but there are other instances of dual standards. And frankly, I will be the first to admit that we do not have ample evidence of those dual standards, in part because those who were involved in the process of affirmative action are loath to make public the information which would allow us to know how those dual standards operate.

In my prepared testimony, which I would ask to be admitted in full in the record, I have noted some information that has become available as a result of a study at the University of California at Berkeley. And there was a great deal of very useful and interesting information about how affirmative action operates at Berkeley, particularly with respect to who was likely to benefit from those programs.

As I note in my testimony, about 14 percent of black students and 17 percent of so called Chicano students in the affirmative action program at Berkeley come from families who earn more than

\$75,000 a year. Now, these are students who were admitted under different standards than whites and Asians were admitted at that same university.

The median GPA of students in the affirmative action program is one-half grade point below that of whites and Asian students. We don't know what the SAT scores were from 1989, or at least this particular study did not publish that information. We do know from previous studies, that there is a large variation in SAT scores between students admitted under the affirmative action programs and those admitted through the regular process. Frankly, we need to know more.

One of the things that this committee could do which I think would be very useful, would be to ask the General Accounting Office to conduct a study of admission standards at universities to find out exactly how these standards operate. Find out what the SAT scores are for the students admitted under affirmative action programs. Find out other information, concerning social and economic indicators.

Are these students, as they were at Berkeley, largely middle class? The median income of all black and Hispanic students at Berkeley admitted in 1989 was the national median income for a family of four that year. So these were largely middle-class students.

Are these the students that are benefiting? Much of the recent criticism of affirmative action programs and the minority business set-asides, for example in the Viacom deal that was heavily criticized a month or so ago, have to do with the fact that many of these preferences are going to people who are quite affluent and well off.

And the question is not whether there was discrimination against Dr. Berry's relatives or whether there is not today current discrimination against people whose skins are black or brown or who are members of other disadvantaged groups. The question is whether or not we cure that discrimination by giving people like Linda Chavez and Linda Chavez' children benefits based solely on their ethnicity, and not on any economic disadvantage or any current-day discrimination that they face.

I would just conclude by saying I have also included in my testimony some information about Hispanics in the United States. There is, I think, tremendous misunderstanding about discrimination against Hispanics in the United States, and also about the social and economic status of Hispanics in the United States, which is largely the result of the phenomenon that Dr. Graham talked about, namely that there is a very large influx of new immigrants who start out life on the bottom. I have included for your information some statistics on earnings and education levels of Hispanics that take into account the effect of immigration.

Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Ms. Chavez follows:]

PREPARED STATEMENT OF LINDA CHAVEZ, PRESIDENT, CENTER FOR EQUAL
OPPORTUNITY

Mr. Chairman,

I am Linda Chavez, president of the Center for Equal Opportunity, a non-profit research and education project specializing in issues related to race, ethnicity, and assimilation. It is a privilege to be with you this afternoon to testify on affirmative action, an issue of profound importance in the current national policy debate on the role of government and one I have been involved with for much of my 25-year professional career. As you know, I was staff director of the U.S. Commission on Civil Rights during the Reagan Administration. I have also taught in affirmative action programs at the University of Colorado and UCLA from 1969-1972, and was a member of the professional staff of this Subcommittee from 1972-1974. I have written extensively on civil rights issues in both professional journals and the popular press and am the author of a book on Hispanics in the United States, Out of the Barrio: Toward a New Politics of Hispanic Assimilation (Basic Books 1991).

So that there be no misunderstanding on this point, let me say that I support equal opportunity without regard to race, national origin, sex, or religion, and the vigorous enforcement of anti-discrimination laws. The civil rights laws passed in the 1960s to guarantee equal opportunity in employment, education, voting, and housing have made ours a more just and fair society. By overwhelming majorities, Americans support equal opportunity and equality before the law.¹ Most Americans support the original idea behind affirmative action as well, that

is: 1) recruiting qualified minorities and women to compete for jobs, promotions, and school admission; and 2) providing those who lack the necessary skills and training the opportunity to obtain them.

But affirmative action today has strayed from its original intent and has become largely a program to confer special benefits on designated groups. The objective is no longer to guarantee equal opportunity but to achieve equal results. The focus is no longer on individuals but groups. And the end justifies whatever means are necessary, including the use of double standards based on race, ethnicity, and gender. What is more, many of the beneficiaries of affirmative action programs today are middle class or even affluent members of preferred racial and ethnic groups. There are now affirmative action programs for minority and female owners of banks and multi-million dollar contracting firms, as well as minority and female graduates of Ivy League universities and professional schools. The recipients may even be second-generation beneficiaries-- the children of parents who were themselves "affirmative action babies," to use Yale Law professor Stephen Carter's designation.

So far from being "disadvantaged" are some of the recipients that the federal government has had to resort to "Newspeak" in defining who is disadvantaged: "Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged"² In other words, no matter how wealthy, or well-educated,

or successful an individual black, Hispanic, Asian, or American Indian is, he or she will be defined *by the federal government* as socially and economically disadvantaged. It is hard to imagine a more patronizing policy than this one, which takes into account not individual accomplishments but group membership.

What effect this de facto designation of all blacks, Hispanics, and others as disadvantaged persons has in the actual operation of affirmative action programs is vitally important in understanding why there is such broad distrust and dislike for affirmative action. Support for affirmative action over the years came largely because most Americans were willing to compensate actual victims of discrimination and to help individuals who were socially or economically disadvantaged because of past discrimination. However, it far less clear today that affirmative action programs are targeted at either of these groups. I say it is far less clear, because, in fact, it is difficult to *know* exactly how most affirmative action programs work. We have precious little information on the characteristics of affirmative action beneficiaries, and less information than we need on what selection criteria affirmative action programs use.

For example, the perception is widespread that blacks, Hispanics, and other minorities, and sometimes women, are held to less rigorous standards than whites (and sometimes Asians) in competing for college and professional school admissions, jobs, and promotions. Certainly, there is abundant reason why so many people believe this is true. The infamous history of “race-norming” job-

aptitude tests by the U.S. Employment Service at the Department of Labor (which, by the way, went on under *Republican* presidents) is a case in point. Until the decade-old practice was outlawed in 1991, more than 3 million persons a year were placed in jobs as a result of Employment Service exams that were race-normed; that is, which were graded so that black and Hispanics received higher ratings than their actual test scores justified.³ Even without race-norming of tests, however, employers and schools often apply racial double standards, which may involve pooling candidates for admission or jobs according to their racial or ethnic background and selecting "the most qualified" from each separate pool. Obtaining accurate information about such practices is often difficult, however.

Among the most closely guarded programs are those that operate in universities, especially with respect to admissions policies. Many schools play a shocking charade of maintaining that they do not lower admissions standards for minority students, while preventing any access to the information that could prove them wrong. In a departure from the usual practice, however, the University of California at Berkeley published information in 1991 that offers a revealing look at the profile of minority students on that campus.⁴ As part of a study of "diversity" on campus, the report notes that the median annual parental income of black students was \$35,000 in 1989, and \$32,000 for so-called Chicano students-- or about the national average that year for all white households in the U.S. (\$32,476).⁵ Perhaps more significantly, 14% of black and 17% of Chicano students came from families which earned more than \$75,000 a year. Yet, the

criteria under which these middle-class and affluent students were admitted differed significantly from that which applied to both white and Asian students (who were also middle class and affluent). The median high school GPAs of minority freshmen (3.4) were one-half point below that of whites and Asians (4.0). The report is silent on the subject of SAT score differences, although other studies show differences as great as 300 points or more between median white and Asian scores and those of blacks and Hispanics admitted to the university.

Many of these Berkeley students admit that they have not faced discrimination in their lives, having attended integrated, suburban schools-- but others 'discover' their victim status once they arrive on campus. As one Mexican American student summed it up, "I thought racism didn't exist and here, you know, it just comes to light."⁶ Many students also noted the pressure to self-segregate that predominated on campus. Most of the black students on campus had attended predominantly white high schools before coming to Berkeley; ironically, these were the students who had the most difficulty adjusting socially to their new environment, according to the report. As one such student put it: "I never saw a colored world until I got here and people started stressing the importance of color."⁷ According to the report, "These students experience a new kind of pressure: it comes from other African Americans students on campus, and it is experienced as pressure to make decisions about friends, social networks, even who you sit with at lunch, on the basis of race."⁸ This preoccupation with race extended beyond students in the affirmative action program to whites and Asians. The study reports that for Asian students: "After being around Cal for

two or three years, students who were integrated into predominantly white worlds of friendship and association in high school report a shift towards having predominantly Asian American friends, roommates, or affiliations with an Asian American organization.”⁹

In fact, increased racial tensions on campus are often the result of preferential policies for minority students, which the Berkeley study acknowledges. At a time when racial attitudes among the general population have improved, many campuses have become balkanized by racial and ethnic conflicts. Indeed, antipathy for affirmative action may play a significant role in polarizing attitudes between whites and blacks in other areas, as well, according to research by Stanford professor Paul M. Sniderman and Berkeley professor Thomas Piazza.¹⁰ Using a sophisticated survey technique, Sniderman and Piazza demonstrated that whites were far more likely to view blacks negatively if they were first asked a question regarding affirmative action. The *mere mention* of affirmative action was enough to elicit increased disapproval of blacks on questions having to do with personal responsibility, for example. Say the authors: "Certainly some whites dislike affirmative action because they dislike blacks, but it is unfortunately also true that a number of whites dislike the idea of affirmative action so much and perceive it to be so unfair that they have come to dislike blacks as a consequence. Hence the special irony of the contemporary politics of race. In the very effort to make things better, we have made some things worse."¹¹ As Sniderman and Piazza go on to explain: "Affirmative Action--

defined to mean preferential treatment-- has become the chief item on the race-conscious agenda. It produces resentment and disaffection not because it assists blacks-- substantial numbers of whites [a *higher* percentage of self-described conservatives than liberals, according to the data in the study] are prepared to support a range of policies to see blacks better off-- but because it is judged to be unfair."¹² Of course reaction to affirmative action is not the only-- or the chief-- cause of prejudice and discrimination, but it can exacerbate those phenomena. The more unfair affirmative action programs are perceived to be, the greater the likelihood that they will increase racial tensions.

Supporters of affirmative action are constantly telling us that these programs benefit poor and disadvantaged minorities and make up for past discrimination. They also claim the such programs do not lead to lower standards or to the application of dual standards based on race. But these are at least partially empirical matters and can be tested to prove if they are right or wrong-- if only we had access to the information in a comprehensive and systematic way. We know, for example, that business set-aside programs apply different and preferential standards based on race and gender in awarding government contracts. The U.S. Commission on Civil Rights in March 1985 (while I was staff director) held hearings in Washington, DC, on set-asides, which documented practices among federal contractors. Speaking of one the best-known programs, the Small Business Administration's 8(a) set-aside, Wayne State University economist Timothy Bates noted: "Participants have rarely 'graduated' from the 8(a) program and become self-sufficient entities. The most

successful minority businesses in the 8(a) program are run by individuals who are not particularly disadvantaged; the truly disadvantaged entrepreneurs who receive assistance, in contrast, fail in droves.¹³ I commend to the Committee the entire two-volume set of these hearings, which I believe remain the most comprehensive on this issue to date.

One of the most useful things Congress could do in this debate on affirmative action is to collect data. The General Accounting Office, for example, could conduct a study of affirmative action in higher education which could help settle the question whether minority students are being admitted to colleges and universities with lower achievement test scores and GPAs. Schools already collect data on the race, ethnicity, and gender of all students and could report information on the median and range of SAT or other achievement test scores, for example, of students admitted by group. Such a study could also provide information on the social and economic characteristics of affirmative action program beneficiaries. It would be interesting to see whether Berkeley's substantially middle-class affirmative action recipients are typical of students in such programs nationwide. How many of such students come from families in which one or both parents are college-educated? How many of these parents also participated in affirmative action programs? Answers to these questions are crucial to determining whether affirmative action programs truly benefit disadvantaged blacks, Hispanics, and others or whether they have become perquisites of a growing elite among these groups.

Before closing, I'd like to say just a few words about two other subjects related to affirmative action, gender-based discrimination and discrimination against Hispanics. Although some public opinion polls show a larger percentage of Americans favor affirmative action programs for women than for blacks and other minorities, I think it would be a terrible mistake to treat gender-based programs any differently than those based on race or ethnicity. They should be subject to the same intensive scrutiny and criticisms. And indeed, I would argue that there is even less justification for maintaining such programs than there is for race- or ethnic-based programs.

Women now outnumber men among college freshmen (55% to 45% in 1993), at four-year colleges and among graduate students as well. What is more, women are far more likely to earn degrees in nontraditional fields including nearly one-third of master's degrees in computer and information sciences, 14 % of master's in engineering, 41 % in mathematics, and 43 of law degrees and 36% of medical degrees.¹⁴ Even the much-vaunted "earnings gap" between men and women has closed significantly in recent years, and is virtually non-existent when men and women's wages in many occupations are compared. According to a 1993 report from the Women's Bureau of the Department of Labor, women mechanics earn 105% of the median weekly earnings of male mechanics, female registered nurses earn 105% of the median weekly earnings of comparable male nurses, female pharmacists earn 90% of the median weekly earnings of male pharmacists, female postal workers earn 97% of the median weekly earnings of male postal workers, etc.¹⁵ Nor do most analyses that point to wage differentials

between men and women take into account differences in hours worked and years of uninterrupted work experience between the sexes, which often depress female earnings since women work, on average, fewer hours per week than men and have more interruptions over the course of their working lives than do males.

With respect to Hispanics, much of the official published data on the social, economic, and educational status of Hispanics is confused and misleading because it fails to take into account the tremendous impact immigration has on the Hispanic population. Simply reciting statistics from one decade to the next on the earnings, education levels, and other social indicators with respect to the aggregate Hispanic population tells almost nothing about whether progress has actually taken place. I have written an entire book on this subject, which demonstrates that the U.S.-born Mexican American population, for example, more closely resembles the non-Hispanic white population in the U.S. in education and earnings than it does the Mexican immigrant population. About half of all adults of Mexican origin living in the U.S. today are foreign born-- a dramatic increase in that population over the last thirty years. In 1970, for example, four-fifths of the Mexican-origin population was U.S. born. Mexican immigrants-- like past immigrants from most nations-- start off life in the U.S. on the bottom rungs of the economic ladder. But there is substantial evidence to suggest that their fortunes will increase the longer they are here. Past studies show Mexican immigrants closing the earnings gap with their native-born peers in about 20 years, although some economists predict this may be more difficult in the future.¹⁶ Nonetheless, it is important-- indeed essential-- to take nativity

into account in assessing what role past discrimination plays in the earnings differentials between Hispanics and non-Hispanics.

My own work, which was based on a sample of 1,889 Mexican-origin men age 25-65 from Current Population Survey data for 1986 and 1988, showed that the unadjusted average weekly earnings of Mexican American men were 83% of those of non-Hispanic white men. After adjusting for the effects of schooling, experience, hours worked, and geographical region of residence, the adjusted average weekly earnings of Mexican American men rose to 93% of white male earnings. The most significant differences between Hispanics and non-Hispanic whites involve education; but here too much of what we hear about Hispanic drop-out rates is misleading. Among the youngest cohort (age 25-34), about 80% of second-generation and about 70% of third-generation Mexican Americans graduate from high school, compared with about 90% of comparable non-Hispanic whites.¹⁷ The confusion stems, in part, from combining aggregate data from foreign-born and U.S.-born Hispanics. Mexican immigrants, for example, have very low education levels (about 6 years on average), which depresses the overall education attainment measure for the entire Mexican-origin population since they make up about half the adults in that group.

In conclusion, Mr. Chairman, it is my sincere hope that this committee will return civil rights policy to its original intent-- that all persons in this society be protected from discrimination on the basis of their sex, race, or national origin-- but that none be given preference on those bases either. The time has come to

abandon double standards and to promote true equality before the law.

1. See Howard Schumann et al. Racial Attitudes in America: Trends and Interpretations (Harvard University Press 1988).
2. C.F.R. 19.001(b) (1994).
3. Holly K. Hacker, "Adjusted Federal Employment Tests Stir Controversy," Los Angeles Times, June 6, 1992.
4. Institute for the Study of Social Change, "The Diversity Project: Final Report," University of California, Berkeley, November 1991.
5. Ibid., p. 50; and 1990 Census of Population, Social and Economic Characteristics, table 87.
6. Final Report op cit., p. 34.
7. Ibid., p. 28.
8. Ibid.
9. Ibid., p. 25.
10. Paul M. Sniderman and Thomas Piazza, The Scar of Race (Belknap Press 1993).
11. Ibid., p. 8.
12. Ibid., p. 177. For information on ideology and willingness to support government programs to help blacks, see pp. 66-87.
13. Timothy Bates, "Minority Business Set-Asides: Theory and Practice," Selected Affirmative Action Topics in Employment and Business Set-Asides (Washington: U.S. Commission on Civil Rights, 1985) Vol. 1, p. 142.
14. Digest of Educational Statistics, Master's and Doctorate Degrees Earned by Field and First Professional Degrees in Selected Professions 1991.
15. U.S. Department of Labor Women's Bureau, "Facts on Working Women," No. 93-5, December 1993.
16. Barry Chiswick, "The Economic Progress of Immigrants: Some Apparently Universal Patterns," The Gateway: U.S. Immigration Issues and Policies (Washington: American Enterprise Institute, 1982).
17. Author's tabulations from Current Population Survey, matched June-September files for 1986 and 1988.

Mr. CANADY. Mr. Taylor.

**STATEMENT OF WILLIAM L. TAYLOR, ESQ., CITIZENS'
COMMISSION ON CIVIL RIGHTS**

Mr. TAYLOR. Mr. Chairman and members of the subcommittee, the thrust of my testimony I will try to summarize in five points as follows: First, racial and gender discrimination sanctioned by law for the better part of two centuries became and still is very deeply entrenched in the institutions of American society. One of the great lessons of the 1950's and the 1960's after *Brown v. Board of Education*, after the Civil Rights Act, was that if discrimination and its effects were to be undone, it couldn't be simply by declaring race and gender neutrality and saying we are a colorblind society.

My reading of the history of the 1960's is very different from Professor Graham's, and rather than go into it now, I would like to submit for the record a study of affirmative action that was conducted by the Citizens' Commission on Civil Rights which is a bipartisan private group of former Federal officials headed by Arthur Flemming. The first 20 pages is the executive summary and I would ask that it be included in the record. The whole report goes into the history fairly carefully.

Mr. CANADY. Without objection.

[The information follows:]

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A Report of the
Citizens' Commission on Civil Rights
June 1984

EXECUTIVE SUMMARY

Introduction, Findings and Recommendations (pp. 22-28, 175-184)

In the 1980s the focus of national debate on civil rights has moved from rights to remedies. Nondiscriminatory treatment of citizens is mandated by law and widely recognized at least in principle if not always in practice. But there is far less agreement on what measures are needed or are effective to correct the impact of mistreatment of people because of their group status.

The current controversy over remedies pits advocates of "neutrality", who believe that mere termination of discriminatory practices is sufficient, against proponents of "affirmative action", who urge the need for additional measures to redress discrimination and to prevent it from recurring in the future.

While this division of opinion has broad implications for civil rights policy in voting, housing, education or other areas, the Citizens' Commission decided to confine its attention to an in-depth examination of federal affirmative action policy as applied to institutions which provide employment and training opportunities. Our intent was to go beyond the rhetoric that has marked much of the public discussion to determine how affirmative action policies, including those that use numerically-based remedies, have worked in practice. Accordingly, we sought to develop a factual record of the discriminatory practices that gave rise to affirmative action policies, of the way in which such policies have evolved, and of the current law of affirmative action. We also investigated the implementation of affirmative action policy by the current

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Administration. Most important, we sought evidence on the practical impact of affirmative action - both statistical information and the informed opinion of employers as well as others who have intimate knowledge of the workings of the policy.

What the Commission discovered was that in the main, federal affirmative action in employment has been a policy marked by pragmatism and compassion. Even the most rigorous remedies (goals and timetables and court ordered ratios) have been administered with a sensitive regard for their impact on all workers as well as on employers and in a manner which preserves other important values such as merit standards. It was also found that while affirmative action alone is not sufficient to provide access to opportunity for victims of deprivation and discrimination, in the past two decades the policy has contributed to the progress that many minorities and women have been able to attain in upgrading their educational and economic status.

Thus, we have concluded that affirmative action is a policy that works. But we are seriously concerned that the utility of affirmative action as a remedial tool is being undermined by attacks on the concept by the Reagan Administration and by the Administration's failure to enforce laws and policies developed by preceding Administrations and upheld by the courts.

Page 3

Our strongest recommendation is that President Reagan reexamine his position of opposition to affirmative action policies developed and implemented by his five predecessors. Though his Administration has had little success in convincing the courts, Congress and most federal agencies of the correctness of its proposals to draw back on enforcement of affirmative action, its stance has encouraged opposition and decreased the protections of law available to persons who have been subjected to discrimination. This recommended change in position should also reflect itself in the nominations and appointments the President makes to the judiciary, independent agencies and Executive Branch positions that have equal opportunity responsibilities. He should designate for those positions only persons who have a demonstrated commitment to the enforcement of civil rights laws.

We believe Congress should seek to enlarge the numbers of persons who have access to the benefits of affirmative action by passing legislation designed to improve basic skills through education and job training and by creating more jobs to meet pressing national needs. Both the Executive Branch and Congress should cooperate in making sure that the necessary personnel and financial support are available for vigorous enforcement of nondiscrimination laws and affirmative action requirements by all responsible agencies.

Congress, of course, should extend affirmative action requirements to its own employment policies, thereby demonstrating its commitment to the nation.

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Further, Congress should take immediate action to address the problem of layoffs. Neither white male workers who have accumulated seniority nor minority or female workers who have gained opportunities through affirmative action should be made to suffer the loss of their jobs. Constructive steps by Congress may include additional incentives to work sharing and certain anti-layoff requirements.

In addition, there is much that can be done by state and local governments and by citizens. Organizations that serve the needs of state and local governments should make available to those governments information on the operation of affirmative action policies, including model statutes and ordinances that may be used to implement such policies on the state and local level.

Organizations and associations that serve the needs of employers and employees should disseminate information on the techniques that have proved successful in implementing affirmative action policies and on the positive results that have been achieved through affirmative action programs.

Lawyers who advise on employment practices should also make available to their clients information on the positive results of affirmative action and on the broad scope the courts have accorded to such programs. In addition, the organized bar and individual law firms should undertake on a pro bono basis to monitor equal employment cases in which the government is a party to make sure that rights are adequately protected.

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Public school systems, colleges and universities, employers, unions and government at all levels should seek means of closer cooperation to assure that programs designed to enhance opportunity - basic skills, job training and affirmative action - are coordinated to achieve the goal.

Page 6

Chapter 1 - HISTORICAL PERSPECTIVES ON AFFIRMATIVE ACTION (pp. 29-65)

The concept of affirmative action to remedy racial injustice had its origins in the Civil War Reconstruction Period. Constitutional amendments and other federal initiatives were undertaken to establish equal opportunity for the former slaves. These initiatives brought about significant advances, among them participation by blacks in elections and elective office. When the federal government, toward the end of the 19th Century, withdrew support for equality the meager political and economic rights which blacks had attained were quickly lost.

Federal support for equal employment opportunity (EEO) was renewed in the early 1940s. President Roosevelt's 1941 Executive Order, prohibiting employment discrimination by federal defense contractors, marked the beginning of a new era in the federal commitment to ensure equality. Successive Presidents continued or expanded the Executive Order program. After two decades of experience in implementing federal EEO policy among federal contractors, it was recognized that a passive policy of non-discrimination was inadequate to achieve equal employment opportunity. Because of entrenched institutional barriers which had developed over many decades of discrimination, a positive program to

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ensure non-discrimination was needed.

In 1961, President Kennedy added to the Executive Order program the requirement that contractors take "affirmative action" to ensure equal opportunity. During the twenty years following the Kennedy order, the meaning and methods of affirmative action were refined. Techniques to identify and eliminate discrimination were improved. When initial affirmative steps, such as recruitment or outreach, proved insufficient to alter exclusionary patterns in some industries, federal agencies developed numerical measures of equal employment opportunity.

Endorsement of affirmative action has not been limited to the executive branch of government. Congress has included authority for affirmative action remedies in several statutes, beginning with the enactment of Title VII of the Civil Rights Act of 1964. Congress also has rejected proposals to limit the scope of affirmative action remedies.

The federal judicial system has widely accepted the correctness and effectiveness of affirmative action to remedy prior discrimination. Federal courts have consistently ordered affirmative action, including such race or sex-conscious numerical measures as goals and timetables and ratio hiring when necessary, to remedy

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past patterns of exclusion and discrimination.

Affirmative action has been supported consistently by Congress, the courts and each of the four previous Administrations, both Republican and Democratic, which have considered it. Despite this broad support for affirmative action, controversy persists, particularly over the use of numerical standards for determining performance.

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Chapter 2 - GOALS, RATIOS AND QUOTAS (pp. 66-88)

The use of numerical bases for assessing equal opportunity performance evolved from the failure of lesser measures to bring about tangible change in the discriminatory patterns of some workforces. Standard techniques that rely on numbers include the "goals and timetables" required of government contractors and "ratio hiring" sometimes required by courts. "Quotas" is a third term often used in the debate over affirmative action.

Goals and timetables are targets set by government contractors for the employment of minorities and women along with time frames for achieving the targets. The hiring goal is a numerically expressed estimate of the percentage of new employees expected to be minorities or women and is based on several factors, including the proportion of such groups who possess the requisite skills in the relevant labor market. Goals and timetables policies require employers to make good faith efforts; failure to achieve a goal does not automatically subject employers to sanctions.

Hiring ratios are requirements imposed by courts after findings of systemic patterns of discrimination. A hiring ratio, for example, may call upon an employer to employ one female or minority applicant for each male or white applicant hired until a goal is reached. In practice, ratio remedies are more rigorous than goals and timetables because ratios focus on each hiring decision rather than on the overall results achieved over time by hiring practices. Both "goals" and "ratios" have been inartfully and inaccurately characterized as "quotas."

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A "quota" is an absolute requirement that an employer hire a specific number or percentage of a particular group, without regard to the availability of qualified candidates or the existence of vacancies. Quota hiring is not a part of national policy and this Commission knows of no case in which Congress, a court or an agency has ever imposed on an employer such a requirement.

Race- or sex-conscious numerical remedies (goals, timetables and ratios) grew out of the persistent use of practices such as word-of-mouth recruiting, "old boy" networks, aptitude and other tests not related to job performance, which continued to prevent the employment of minorities and women even after overt practices of discrimination had ended. Such numerical measures have been deemed by the courts to be essential to meaningful equal employment opportunity for minorities and women.

The Supreme Court in three important cases has validated the main tenets of affirmative action policy. In Weber (1979), the Court upheld an agreement between an employer and a union to establish an employee training program in which slots were allocated equally to black and white employees regardless of seniority. In Fullilove (1980), the Court sustained the constitutionality of a congressional "set-aside" for minority businesses in federally-sponsored public works programs. And in Bakke (1978), while striking down a rigid system employed by the University of California to allocate places in medical schools to minorities, the Court ruled

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that race could be used as a factor in the admissions process, to deal with past patterns of exclusion, to promote the goal of diversity or for other purposes. Federal courts of appeals also have been consistent in sustaining the use of numerically-based remedies including ratio hiring, where their need has been demonstrated.

At the same time courts and federal agencies have been careful to ensure that white males are not displaced from positions they hold or required to bear an unreasonable or unnecessary burden because of such remedies. Goals and ratios have been limited to circumstances in which other measures would be inadequate.

Notwithstanding the consistent, bipartisan support numerical remedies have received, and the considerable body of legal precedent and logic which has impelled the federal government to undertake such remedies, affirmative action has been under attack in the Reagan Administration.

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Chapter 3 - THE REAGAN ADMINISTRATION RECORD (pp. 89-120)

The Reagan Administration, while endorsing affirmative action in general terms, has attempted to undermine its use. The focus of Administration efforts has been an attack in the courts and in public forums on the use of goals and ratios. In addition, the Administration has weakened affirmative action policy by decreasing budgets and enforcement activities and by failing to foster stability in leadership of the agencies which implement the policy.

Among the responsible agencies, affirmative action policy has varied. The Department of Labor has endorsed goals and timetables, but has sought to weaken materially its affirmative action regulations. The Department's enforcement activities have slowed down considerably in the Reagan Administration. The Equal Employment Opportunity Commission has maintained its support for numerical remedies, but its ability to implement such measures has been restricted. The U.S. Commission on Civil Rights, its independence eroded by President Reagan's dismissal of Commissioners, has backed away without any further study from past reports approving goal and ratio relief.

Acting in pursuit of what it states is the true Reagan Administration policy, the Department of Justice also has sought to bring an end to the use of numerical goals and ratio remedies. The Department of Justice has advanced its opposition to such remedies in public pronouncements, in efforts to

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impose its will on other agencies and in cases to which it is a party. It also has attempted to intervene in other cases to request that a court reconsider use of goals and ratio relief. The Department's avowed objective is to find a legal vehicle to convince the Supreme Court that it "wrongly decided" the 1979 case of Weber v. Kaiser Aluminum Corp., in which the Court upheld private use of race-conscious ratio selection of employees for a training program. The Department argues that race or sex-conscious remedies, such as hiring goals or ratios, prefer minorities and women who are not victims of discrimination and disadvantage white males who are innocent of any wrongdoing.

The Department has had little success, thus far, in convincing the courts, Congress or most other federal agencies of the correctness of its views. Recently the Fifth Circuit Court of Appeals, in an en banc decision in Williams v. New Orleans, resoundingly rejected the Justice Department's arguments against race-conscious numerical remedies. Nevertheless, the Department's vigorous opposition to affirmative action remedies has fostered resistance to and relaxation of federal affirmative action policies.

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Chapter 4 - THE IMPACT OF AFFIRMATIVE ACTION (pp. 121-146)

Much evidence shows that implementation of affirmative action policy has led to improved occupational and income status for minorities and women.

Gains have occurred across the spectrum of occupations: in the professions (such as law, medicine and psychology); in managerial positions; in the construction trades; in manufacturing and trucking; in service occupations; in police departments and other public service positions.

These gains are clearly linked to affirmative action. Two recent studies on the effect of federal affirmative action policy under the Executive Order contract compliance program - one done by the Department of Labor and the other performed under contract to it - concluded that the program has a measurable, positive impact in increasing minority and female employment among federal contractors. Such gains are also seen when one traces over time the changes in employment patterns of large companies that have entered into affirmative action consent decrees. This conclusion was also confirmed by representatives of business who participated in a consultation held by the Citizens' Commission. These business leaders described their affirmative action programs and endorsed goals and timetables as a useful and appropriate management tool.

The business consultation also elicited testimony about other benefits that have flowed from affirmative action.

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One such benefit has been an expansion of markets and clientele. The representative of one company reported, for example, that minority insurance agents brought in minority customers who were not previously insured by that company.

Another important effect of affirmative action has been a streamlining of job requirements and personnel practices that has inured to the benefit of all employees. Business representatives reported that the elimination of non-job related requirements from job descriptions, the improvement of counseling services and grievance procedures, the establishment of uniform employee evaluation policies all promoted a greater sense of fairness among employees. These findings were supported by the responses to the Commission's survey questionnaire on affirmative action, sent to some 200 companies which varied by size, industry and geographical local.

More than one third of the respondents reported that implementation of affirmative action plans resulted in increased employee job satisfaction as reflected by such measures as fewer employee grievances, decreased absenteeism or decreased employee turnover. Most companies reported that affirmative action programs had enhanced their public image and overall goodwill.

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Chapter 5 - THE DEBATE OVER AFFIRMATIVE ACTION (pp. 147-174)

Affirmative action, particularly the use of goals and timetables and court-ordered ratio hiring, remains subject to great controversy. Charges persist that such remedies constitute "preferential treatment," that they benefit some who do not need assistance while failing to help others who do, that they impose bureaucratic burdens on employers, and that they threaten standards of merit. These criticisms call for careful evaluation in light of what has been learned about the needs that gave rise to affirmative action, the ways in which the policy has been administered over two decades and the impact that it has had on employers, employees and upon society as a whole.

Some argue that affirmative action constitutes "reverse discrimination" in that it disadvantages white males who neither participated in nor benefitted from prior discrimination. This criticism ignores the fact that courts have taken pains to balance competing interests in shaping affirmative action remedies. They have held that expectations of white workers may be disappointed as a result of affirmative action remedies, but that such workers are not to be displaced from their jobs to make room for minorities (or women) deserving of a remedy, even where an identifiable white worker may actually have profited from the employer's discrimination. Courts have also made it clear that ratio

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is a temporary measure which may be used only until the conditions of exclusion or segregation that gave rise to the remedy are eliminated. Layoff situations where discharge of employees according to seniority would wipe out affirmative action gains pose more difficult problems. But public policy initiatives, e.g., work sharing, are available to assure that burdens are allocated equitably. The courts have recognized, however, that burdens cannot be avoided entirely since affirmative action is needed to withdraw the unfair economic advantage that past practices of discrimination conferred on white males.

Affirmative action has also been criticized on the grounds that it establishes racial/ethnic categories that are arbitrary and either over- or under-inclusive, that it has benefitted people who do not need assistance and has failed to benefit people who do. With respect to criticisms of under-inclusiveness, public policy determinations of which groups are eligible for the benefits of affirmative action are based on a principle: that members of groups that have been subjected to official, governmentally-sanctioned discrimination are entitled to the remedial measures provided by affirmative action. Admittedly, the categories used in affirmative action do not always work perfectly in all instances to link wrongs and remedies. Despite imperfections, it is doubtful that any substitute set of classifications would address the needs of affirmative action as well or better. Efforts to limit affirmative action to

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persons who are "identifiable victims" of discrimination or who can demonstrate disadvantage would unduly narrow the remedy or make the policy unadministrable.

Critics of affirmative action cite the persistence of high levels of unemployment and poverty to argue that the policy does not help minorities who are most disadvantaged.

Defenders of affirmative action concede that it is not a self-sufficient policy that will deal adequately with the combined effects of discrimination and disadvantage. The availability of employment opportunity is determined in large measure by the business cycle and macroeconomic policies. Affirmative action also will be of little benefit to people who are functionally illiterate, who do not possess basic skills, or who suffer other disabilities that prevent them from readily acquiring the skills to function effectively in the job market. But this means only that affirmative action is not a self-sufficient policy for providing mobility, not that it is ineffective. The gains made by minorities in police and fire departments, in the construction trades and other areas show that affirmative action is not merely a policy for the advantaged. Similarly, studies show that many minority students in medical schools come from families of lower income and job status.

Some in the business community have complained about the costs, paperwork requirements and administrative burdens posed by the contract compliance program. Without having undertaken a full

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evaluation of these criticisms, it should be noted that complaints about the administration of affirmative action requirements do not call into question the basic need for such a remedy, nor do these concerns go to the overall effectiveness of affirmative action in providing the remedy. The Commission's consultation with business leaders also suggested that affirmative action requirements have impelled business to simplify and regularize job requirements and personnel practices, thus offsetting to some degree the paperwork burden imposed by requirements themselves.

A further major criticism of affirmative action is that it runs counter to the use of merit standards which, in principle if not always in practice, is the prime means of allocating benefits and status among citizens in this country. This, it is said, works to everyone's detriment, including minorities who are stigmatized by the knowledge that they have not made it on their own merit.

This criticism is incorrect. Federal affirmative action policy recognizes and incorporates the principle of merit. Courts have said repeatedly that the purpose of affirmative action remedies is to create "an environment where merit can prevail." As one court has said, "[I]f a party is not qualified for a position in the first instance, affirmative action considerations do not come into play." While every public policy is subject to maladministration, unless abuses become overwhelming, the appropriate action is to cure the

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specific problem, not junk the policy. The Commission found no evidence of serious abuse.

What affirmative action offers mainly is the opportunity to compete and prove one's own merit. People who are given the opportunity by affirmative action to enter the competition and who then compete successfully by their own efforts should have no fear of being stigmatized by affirmative action. The risk is, rather, that stigma will result from the continuation of longstanding prejudice. For the Commission, the important point is that as difficult as merit standards may be to define and apply, affirmative action policies have sought to stay consistent with them.

Critics also have argued that race-conscious remedies run counter to the ideal of a "color blind" society and elevate group rights over the rights of individuals. The criticism ignores the fact that past wrongs against groups have persistent, present-day effects which can only be countered by group-conscious actions.

In the end, the positions that people take in the debate hinge on their assessments of the relative dangers of "race conscious" or "race neutral" policies. Opponents of affirmative action fear that they will become ingrained in law and policy leading to a society permanently divided along racial lines. Proponents of affirmative action do not lightly dismiss these concerns, but they believe in a majoritarian

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society there are built-in checks against excesses that favor minorities. Rather, for advocates of affirmative action, the real dangers lie elsewhere. The long history and experience of this nation's struggle against injustice suggest that without a positive program to correct past wrongs, they will never be remedied.

Mr. TAYLOR. Thank you.

It is only when the Nation adopted policies of affirmative remedies for discrimination, including policies of affirmative action that we began to make progress that provided genuine opportunity for people, tangible differences in their lives, the ability for them to change their own lives.

Second, under affirmative action policies and notably goals and timetables under Executive Order 11246 on Government contracts, and affirmative policies by colleges, and universities, real progress in education and employment has been made.

Affirmative action, in my view, has been most critical at the gateways, helping people to get into colleges and universities, helping them to get that first job in areas where they did not have opportunity previously. Once they got in, they had to do it on their own. They had to prove themselves, and they have done it.

Progress has not come, contrary to what you have heard here, largely for advantaged people. On pages 4 through 8 of my testimony, I cite the figures for gains in the 1970's and 1980's, by blacks, other minorities and women, in police departments, fire departments, in construction trades, craft and clerical jobs, in industries like the telephone industry. These gains have not been made by advantaged people, but by people from families who are struggling to get a foothold in this society.

One of the most encouraging things is that civil rights remedies and other affirmative remedies have contributed to the growth of a substantial black middle class and that has come through gains in higher education and through increased job opportunities. What we have is a kind of positive dynamic with gains being handed down to the next generation.

I would hope the committee would look at a Rand Corp. study, "Student Achievement and the Changing American Family," that finds that between the 1970's and 1990's, the gap between teenagers, black and white, ages 13 through 17 on achievement tests was cut almost in half. That is not what you keep hearing. But that is what has occurred. The gap has been narrowed.

This came from improved parent education, parents having college experience, smaller families, other factors which Rand itself attributes to equal opportunity policies. The closing of the achievement gap shows that in the end, affirmative action is not diluting the merit principle. In fact, it is helping to create more competent and capable workers and improve the productivity of the Nation.

We are all familiar with the negative cycle. Congress recently debated that issue in welfare reform. Let's not pull the props out from families who are beginning to succeed by repealing affirmative action or doing other things that might harm them.

Third, affirmative action is still needed. Regrettably, the evidence is there that despite the gains, discriminatory practices are still pervasive. Look at the Urban Institute studies which I think are very compelling in that regard. Look at the Glass Ceiling Commission report. Look at the number of complaints still filed with the EEOC. Look at the Justice Department cases. Look at what is happening in the States.

Fourth, affirmative action has not worked in a way that is basically unfairly to others. The policy has evolved under the Burger

and Rehnquist Courts which have carefully balanced the interests of minorities and women with those of white males. They have made it clear, the courts have made it clear, first of all, that there has to be a strong basis for affirmative action policy, either past discrimination or a manifest racial imbalance. They have made it clear also that the job status of white males will be protected, that seniority will govern in layoff situations even if affirmative action is wiped out.

I will just take another minute or so.

Certainly, there can be abuses in that policy, but the evidence is—and it is in my testimony that the numbers of such cases are small.

And I would say to my friend Linda Chavez, that the Reagan administration and the Bush administration had 12 years to document those abuses. I personally asked William Bradford Reynolds to look into it if he thought there were abuses, but that wasn't done. If there are abuses they are not hard to get at.

I would join in an effort to say let's find them now and root them out. If there are abuses, let's root them out.

Finally, what would be the effect of undoing affirmative action? Anybody who thinks that we were or would become a calm and serene and domestically tranquil society if we just eliminated affirmative action, if we just repealed it, I think, is very, very wrong. The racial tensions, the ethnic divisions in our country are very strong.

We have done worst when we pretend these tensions don't exist and we have assumed that they would go away. The only way to get at our problems is to confront them and to work hard to solve them, and that will not be done by repealing affirmative action policy.

Thank you.

Mr. CANADY. Thank you, Mr. Taylor.

[The prepared statement of Mr. Taylor follows:]

PREPARED STATEMENT OF WILLIAM L. TAYLOR, ESQ., CITIZENS' COMMISSION ON CIVIL RIGHTS

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify today on the issues surrounding affirmative action.

As a preliminary matter, Mr. Chairman, I might note that I have served as a civil rights lawyer in one capacity or another ever since I joined Thurgood Marshall's staff at the NAACP Legal Defense Fund forty years ago last December.

I believe that the greatest changes I have witnessed in my lifetime have to do not with the coming of the space age or the ongoing technological revolution but with the progress in this country that black people, members of other racial and ethnic minorities, women and disabled people have made from the status of being second class citizens toward becoming full participants in the economic and civic life of the nation.

At the same time, it has been sobering to learn from experience how entrenched some forms of discrimination and prejudice are in our society. It is fair to say that apart from the brief period of Reconstruction after the Civil War, it has only been in the last four decades that equality of opportunity has become national policy and that we have engaged in an effort to find fair and effective ways to end and

remedy the discriminatory practices that extended over a period of two centuries. While we have made great gains during this period, the lives of hundreds of thousands of people remain untouched by civil rights laws and policies, and children are being born today who have little hope of having a fair and equal opportunity to lead productive and successful lives.

It is in this context that I believe any examination of affirmative action policy should take place. I intend to focus today primarily on affirmative action policy in the areas of employment and education because I believe those are the gateways where if people are given an opportunity, they can prove their merit and become productive citizens.

Perhaps it would be helpful to begin by defining our terms. Affirmative action is a term which broadly "encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."¹ In employment, affirmative action refers to a wide variety of measures including: development by employers of articulated equal employment policies and dissemination of the policies; review of specific employment practices to determine whether their impact is discriminatory; equal employment training for those who make personnel decisions; special outreach and recruitment efforts by employers; the initiation of programs to train and upgrade the skills of employees; the keeping of records to

¹U.S. Commission on Civil Rights, Statement on Affirmative Action, at 2 (October 1977).

ascertain the impact of employment practices on minorities and women; the establishment of numerical goals and timetables, and on occasion, ratios, for the hiring or promotion of specified minorities, females, or others. In education, affirmative action can mean such measures as admissions policies designed to encourage application by minorities; and minority scholarships both at the federal level and of the type initiated by the University of Maryland.

All of these are measures that courts or other competent government bodies have found necessary in certain circumstances to address the systemic or institutional aspects of discrimination which remain after overt practices have been eliminated.

The focus of criticism today is on measures such as goals and timetables and similar measures adopted when lesser affirmative action steps proved ineffective in substantially changing entrenched patterns. The questions being asked include the following: Has affirmative action worked? Is affirmative action still needed? Is affirmative action unfair to others; does it undermine the merit principle? Are the social costs of affirmative action too high? What would be the cost to society of abandoning affirmative action?

1. Has Affirmative Action Worked?

In examining the impact of affirmative action, I want to go beyond the rhetoric that has marked much of the public discussion and talk about how affirmative action policies have worked in practice.

Much evidence shows that affirmative action is one of a cluster of national policies that enabled minorities and women to make substantial economic and

educational gains during the 1970s and 1980s. These gains have occurred across the spectrum of occupations--in police and fire departments and other public service occupations, in manufacturing and trucking, in the construction trades, in service occupations, in managerial positions, and in the professions.

It is doubtful that these gains in occupational status could have occurred without federal affirmative action. Some of the greatest gains have occurred in areas from which minorities were traditionally excluded (such as police forces, fire departments and construction work) and which were the subject of specific federal efforts. So, for example, in police departments, the numbers of black police officers went from 23,796 in 1970 to 63,855 in 1990.² Black representation in fire departments rose from 2.5% in 1960 to 11.5% in 1990.³ In the Citizens' Commission's 1984 study on affirmative action, we reported that OFCCP found that fewer than 1% of construction workers were minority before the Philadelphia Plan, an affirmative action plan that was adopted in the late 1960s; by 1982, more than 12% of Philadelphia construction workers were minority.⁴

²Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal, Ballantine Books (1992).

³Id.

⁴The Citizens' Commission on Civil Rights is a private group of former cabinet officers and other federal officials who held civil rights responsibilities in previous Administrations. It is composed almost equally of Republicans and Democrats and was established in 1982 to monitor and report on Federal civil rights policy. I serve as Vice-Chair of the Commission. The Commission's 1984 report, Affirmative Action to Open the Doors of Job Opportunity, is a comprehensive examination of federal policy including the history of affirmative action, a legal analysis, an examination of the effects of affirmative action, including the views of corporate leaders, and a discussion of the policy issues. The Commission is now updating the 1984 report.

Black representation also increased dramatically in other key industries during the period 1970-1990. For example, the number of electricians went from 14,145 to 43,276; bank tellers from 10,633 to 46,332; health officials from 3,914 to 13,125; and pharmacists from 2,501 to 7,011. During the same period, the proportion of accountants and auditors who are black increased more than four times, and the proportions of electricians more than doubled.⁵

The strides made by women in some traditionally all-male occupations have also been dramatic. As one example, during the period 1981-1991, following the implementation of an affirmative action consent decree, the total number of women working in the U.S. Forest Service increased from 27.8% in 1981 to 43.5% in 1991; in professional job categories, from 11.9% in 1981 to 36.9% in 1991; in administrative positions, from 31.8% in 1981 to 68.4% in 1991; and in technical positions, from 17.5% in 1981 to 33.5% in 1991.⁶

When one turns to specific companies subject to affirmative action requirements, changes in workforce composition becomes especially vivid. One frequently cited example is AT&T, which entered into a six-year consent decree in 1973 to correct its prior discriminatory employment practices. According to figures provided by AT&T in connection with the Citizens' Commission's 1984 report, the company increased its representation of minorities and women during the period of

⁵Id.

⁶These statistics were furnished by Equal Rights Advocates in San Francisco.

the consent decree as well as after the decree ended in 1979. Specifically, the percentage of minorities in management increased from 4.6% in 1971 to 10.0% in 1978 and 13.1% in 1982; the percentage of women in management increased from 33.27% in 1971 to 35.9% in 1978 and 39.6% in 1982; the percentage of minorities in craft jobs increased from 8.4% in 1971 to 11.6% in 1978 and 14.0% in 1982; the percentage of women in craft increased from 2.8% in 1971 to 10.1% in 1978 and 12.3% in 1982; and the percentage of males in clerical increased from 4.1% in 1972 to 11.1% in 1978 and 11.4% in 1982.

In short, affirmative action has helped produce many gains for minorities and women in our nation's workforce. There also can be little question that affirmative action policies of colleges and universities and the creation of more minority scholarship opportunities, along with federal programs providing greater access for low income students to institutions of higher education through loans and Pell grants, have played a large role in the major increases in minority college enrollment that we saw during the 1970s and 1980s.

These diverse examples all illustrate a single point: affirmative action has helped produce marked improvement in employment and advancement opportunities for minorities and women. Moreover, the gains made by minorities in police and fire departments, in the construction trades and other areas show that affirmative action is not merely a policy for the advantaged. The people entering those occupations were not the children of affluent citizens, but largely members of families struggling to gain a foothold on the occupational ladder. Similarly, studies show that many

minority students in medical schools have come from families of low income and job status, indicating that affirmative action policies have resulted in increased mobility, not simply in changing occupational preferences in middle class minority families.⁷

The gains in employment and education that black people have made through affirmative action and other initiatives have contributed to the growth of a black middle class and to the development of a positive dynamic.

A recent study by the RAND Corporation - Student Achievement and the Changing American Family, Kirby, Berends and Williamson (1994) - reports that the largest gains in student performance in schools from 1970 to 1990 were made by minority students. Indeed, according to this study and others, 40 percent or more of the academic gap between black and white youngsters was closed during this period.

That is remarkable progress. Among the contributing factors according to the RAND study is the fact that the numbers of black parents with college degrees or experience quadrupled during the two decades so that now about 25% of black parents have college degrees or experience. (Hispanic-American parents have made similar, although less dramatic, educational gains). The occupational and income gains made by black parents during this period have also contributed to the formation of stable, middle class families and to the achievement gains of children. Affirmative action has played an important role in all of this.

⁷See M. Alexis, "The Effect of Admission Procedures on Minority Enrollment in Graduate and Professional Schools," in Working Papers: Bakke, Weber and Affirmative Action, (N.Y. Rockefeller Foundation, 1979).

In short, what we are witnessing for those who have had the opportunity is the kind of progress that is handed down to succeeding generations. That is the positive dynamic we have all been seeking -- not the negative cycle of discrimination, deprivation, dependency, family breakup and various forms of pathology. If we pull the props out from families that are beginning to succeed by repealing affirmative action, we can expect more people to fall back into this negative cycle.

And we should not fail to note that the RAND study and others like it provide powerful evidence that affirmative action policies do not dilute the merit principle. As the achievement gap between minorities and whites is closed, what we are witnessing is increased productivity for individuals and for the nation.

2. Is Affirmative Action Still Needed?

While affirmative action has contributed significantly to a closing of the gap attributable to discrimination, minorities and women still face barriers in seeking jobs, education and housing. Evidence of the continuing legacy of discrimination can be seen in the number of complaints of employment discrimination filed at the Equal Employment Opportunity Commission (over 91,000 last year); the litany of Justice Department cases cited by Assistant Attorney General Deval Patrick in his testimony before the House Subcommittee on Employer-Employee Relations last month; the testing studies conducted by the Urban Institute and the Fair Employment Council of Greater Washington summarizing the overall prevalence of discrimination encountered by minority job seekers; and the conclusions of the Glass Ceiling Commission's report, which include, among other things, findings that 97% of senior managers at Fortune

1000 industrial corporations are white males, and that only 5% of senior management at industrial and service companies are women, virtually all of them white.

Other indicia that opportunities are still denied minorities are the racial gaps in poverty, unemployment, and income that the Citizens' Commission has documented in its civil rights reports.

The sad truth is that despite thirty years of civil rights laws, some people grow up untouched by them--cut off from access to services and opportunities that would make them full participants in society. While neither a panacea nor a substitute for economic growth, education, and job training, affirmative action will continue to be needed as long as discrimination persists.

3. Is Affirmative Action Unfair to Others?

The notion that affirmative action somehow constitutes "reverse discrimination" ignores the fact that courts have taken pains to balance competing interests in shaping affirmative action remedies. The rules of affirmative action have been worked out over two decades, and the parameters of the policy have been set by the Burger and Rehnquist courts. Courts have required that there be a strong basis for invoking race or gender-conscious remedies--for example, to remedy past discrimination (United Steelworkers v. Weber, 443 U.S. 193 (1979), where the Supreme Court upheld a voluntary plan to remedy past discrimination in occupations traditionally closed to minorities), or to deal with the effects of manifest racial or sexual imbalance (Johnson v. Transportation Agency, Santa Clara County, CA, 480 U.S., 107 S.Ct.1442 (1987),

Court held lawful an affirmative action plan that had been adopted to redress a manifest imbalance of women workers in a traditionally segregated job category).

The courts have also limited affirmative action to ensure that interests of whites are not "unduly trammled." This has meant that seniority rights in layoffs are protected even at the cost of erasing the gains of an affirmative action plan.

Nor does affirmative action run counter to the use of merit standards, as critics have charged. As indicated above, there is little evidence that affirmative action has brought about an erosion of the merit principle. In addition to the evidence cited, the testimony of employers in connection with the Citizens' Commission's 1984 study indicates their belief that affirmative action does not impair productivity.

Certainly affirmative action, like any other policy, is subject to abuse. And abuses should be rooted out. But evidence of misapplication of the policy is minimal (as is demonstrated by the Equal Employment Opportunity Commission's data that of race based charges received by the EEOC, only 1.7% of the total are made by white males filing on the basis of race, as well as by the recent study of court cases and other data conducted by Professor Alfred Blumrosen of Rutgers, which found that "reverse discrimination" cases accounted for a tiny percentage of some 3,000 reported employment discrimination cases between 1990 and 1994), and certainly not cause to junk the policy.

4. What would be the cost to society of abandoning affirmative action?

Abandoning affirmative action policy is bound to do damage to the economic status of minorities and women. There is some indication that this is what happened after the Supreme Court rendered the Croson decision in 1989: in Richmond, minority business construction fell from nearly 40% of the total dollars to 15% immediately after the lower court first struck down the program, and was below 3% during the first six months of 1988; in Tampa, minority business participation dropped from 22% to 5.2% in the quarter following suspension of the 25% goal in March 1989; in Philadelphia, public works subcontracts awarded to minority or women-owned firms was 97% less in May 1990 than in May 1989, with minority business rate participation falling to 1.92% in November 1990.⁸

Abandoning affirmative action would also likely divide us even more into a society of "haves" and "havenots."

Certainly we all aspire to become a "colorblind" society in which judgments are made, in Dr. King's memorable phrase, on the contents of one's character rather than the color of one's skin. But who in this room or this Congress or this nation can say with a straight face that we have reached the point in our society where the great bulk of our citizens are color blind, where race does not matter, where children do not suffer disadvantage because of their race or national origin?

⁸Final Report of the U.S. Commission on Minority Business Development (1992).

If we cannot truthfully make these statements, then abolishing or curtailing affirmative action would be akin to throwing away one of the major cures while allowing the disease to continue unchecked.

Mr. CANADY. Mr. Custred.

STATEMENT OF GLYNN CUSTRED, COAUTHOR, CALIFORNIA CIVIL RIGHTS INITIATIVE

Mr. CUSTRED. Mr. Chairman, I am Glynn Custred, professor of anthropology at California State University, Haywood, and co-author of the California Civil Rights Initiative, a proposed ballot amendment to the constitution of the State of California.

I am pleased to be here today to explain to the Subcommittee on the Constitution what our initiative is, why it is necessary and what we hope to achieve by its passage in California. The operative clause of the initiative reads as follows: Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against or granting preferential treatment to any individual or group in the operation of the State system of public employment, public education, or public contracting.

Such an amendment is needed in California in order to counter a growing trend of racial, ethnic, and gender preferences in the public sector, policies which have worked to the detriment of our public institutions, the people who constitute them and those whom they served.

For example, in the area of Government contracting, the entire competitive bidding process has been turned upside down by policies which do not always award contracts to the lowest bidder. Such cases contracts are given instead to the lowest bid from a politically correct firm. Such a system encourages fraud and the development of an ethnic and racial spoil system at taxpayers expense.

In fact, the legislative analyst of the State of California has estimated that if such policies were made unlawful by the passage of the California Civil Rights Initiative, the State and local governments could save millions of dollars each year which could be better invested in education and other public services.

Racial, ethnic and gender preferences in employment also adversely affect public institutions and public agencies by diluting standards and thus by diminishing the services these institutions and agencies provide. Moreover, such preferences trammel the rights of those individuals who are passed over in employment and in promotion because of their race, ethnicity, or sex.

In education, the mission of colleges and universities is compromised when preferences are imposed not to meet the needs of students, but rather to create the kinds of racial and ethnic proportions in the student body demanded by bureaucratic mandate. The California Civil Rights Initiative is designed to prohibit such policies and to reassert the basic principles of individual rights equality of opportunity, advancement by merit and equal protection before the law.

These principles lay at the heart of the civil rights movement of the 1960's. They are the bedrock of American constitutional government. In drafting the initiative, my coauthor, Thomas Wood and I, have closely tracked the language of the 1964 Civil Rights Act which was intended to realize these principles for all Americans.

We have also tried to make as explicit as possible the intent of that legislation as revealed in congressional tapes at the time and as recorded in the Congressional Record. In soliciting support for the California Civil Rights Initiative, we have contacted both Democrats and Republicans, liberals and conservatives, as well as men and women and individuals from different racial and ethnic groups since we see this initiative not as a partisan program or a racial and gender issue, but rather as a matter of fundamental principle which affects us all.

Our initiative covers only those areas of public policy which lie within the jurisdiction of the State of California. It does not touch consent decrees which involve Federal judges.

We would hope, therefore, that the Judiciary Committee might look into such consent decrees in California and elsewhere and into those policies of racial, ethnic, and gender preferences which are familiar under Federal jurisdiction.

The initiative process in California is a means of dealing with important issues when representative government fails or when it refuses to act responsibly. For example, the text of the initiative was twice introduced in the California State Legislature and twice defeated in committee along strict party lines, thus, depriving that body of the opportunity to debate this historical question.

If the legislature had passed the amendment, the voters would have made their choice in March 1996 in the primary election, not in November Presidential election. We would have preferred a March vote, since it would have kept the issue clear of the partisan Presidential campaign.

However, since the legislature has failed to act on this matter, we have no other choice but to begin collecting signatures for the November ballot, the earliest date we can hope to make without the help of the legislature. We are confident of victory since numerous polls as well as the enthusiasm already generated by our efforts indicate that this is a measure which enjoys wide support.

In California, we have every intention of conducting this debate on the highest level for the good of the State and the Nation and we trust that this will be the case elsewhere as well.

Thank you.

[The prepared statement of Mr. Custred follows:]

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Mr. Chairman:

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Racial, ethnic and gender preferences in employment also adversely affect public institutions and public agencies by diluting standards and thus by diminishing the services these institutions and agencies provide. Moreover, such preferences trammel the rights of those individuals who are passed over in employment and in promotion because of their race, ethnicity or sex. In education the mission of colleges and universities is compromised when preferences are imposed not to meet the needs of students, but rather to create the kinds of racial and ethnic proportions in the student body demanded by bureaucratic mandate.

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protection before the law. These principles lay at the heart of the Civil Rights Movement of the nineteen sixties; they are the bedrock of American constitutional government. In drafting the initiative my co-author, Thomas Wood, and I have closely tracked the language of the 1964 Civil Rights Act which was intended to realize those principles for all Americans. We have also tried to make as explicit as possible the intent of that legislation as revealed in congressional debates of the time, and as recorded in the Congressional Record.

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Mr. CANADY. Thank you very much.

I thank each of the witnesses for being here today.

We are dealing with a very complex issue and it has a complex history.

Mr. Frank rightly noted Congress has been deeply involved in this. Although the point I was trying to make in my initial remarks is that initially the movements for affirmative action were undertaken administratively and in the judicial branch, Congress came along later and has helped enact the massive structure of preferences that exist in the law today.

When this structure began and as it has been developed, I think most have viewed it as a temporary structure. Most have viewed affirmative action measures and preferences as measures that are put in place to remedy a history of wrongdoing.

And Professor Berry, let me say that your—your discussion of past discrimination in this country, I think, is very accurate. And you describe very well the shameful history of discrimination that existed in this country.

But when this structure of preferences was put in place, as it evolved, it was viewed as something that was temporary, something that would be necessary for a period of time in order to correct those past acts of wrongdoing.

The question now is how long should this system remain in place? Or have we reached the point where we should just recognize that it is not temporary, that it needs to be a permanent part of our system?

And could you respond to that, Professor Berry? Do you see a system of preferences, affirmative action, whatever terminology you want to use, as something that has to become a permanent part of the way we do business?

Dr. BERRY. Mr. Chairman, a striking figure to me is that 53 percent of African-American men between the ages of 21 and 34 at this moment, ones who are not in jail, 53 percent, 21 to 34, have no job or they are underemployed and don't make enough money to support anybody except themselves. And we all talk about family formation. I am a big family, nuclear family, supporter. Fifty-three percent at the prime family formation age. And William Julius Wilson out at the University of Chicago has done a study which shows that employers won't even hire them for unskilled jobs. I am not talking about skilled jobs. So that is a telling statistic.

The Glass Ceiling report says 97 percent of the good jobs in America are owned by white men. I guess the answer is, Should there be 100 percent? The history is that affirmative action has not been enforced for 30 years. People keep saying that affirmative action has been enforced—I hear people say that on television. It hasn't been enforced. It was only enforced between 1971 and 1975. That is all the enforcement we had by the Federal Government. You had the private sector trying to do it. If you look at the numbers, the tester data on discrimination, I think we need to have some kind of affirmative action—

Mr. CANADY. Let me just clarify this. Are you saying since 1975 affirmative action has not been enforced by the Federal Government?

Dr. BERRY. The Federal Government has either weakly or not enforced affirmative action since then. It has been enforced by people bringing lawsuits. It has been enforced by the private sector complying and trying to have diversity and trying to do what they think is right.

Mr. CANADY. Do you believe the Department of Justice today is not enforcing these policies?

Dr. BERRY. I don't know what they are doing now. They are not enforcing it as strongly as I would like. The EEOC is a swamp. Everybody knows that. It has been a swamp for years. You died before you got anything decided by the EEOC if you filed a complaint.

I wouldn't tell anybody I liked to file one. So I am telling you this. I mean that, at this hour. It is a shame. It is a national disgrace. So that shows how unserious we are about the subject.

So all I am saying to you is I would like more than anybody to be able not to have to have affirmative action. And I would like more than anybody to get rid of the system of group preferences that we have had since the 17th century—preferences for white folk, and men, and I hope that we will begin now. These hearings can do a great service if you would see to it that the Government enforces these laws, cleans up the abuses. And let us not get in the way of the private sector that is trying to do a good job. If we could get this over with, and maybe in about 10 years, we wouldn't need affirmative action anymore. And I would love that.

Ms. Chavez, could you comment on that same question?

Ms. CHAVEZ. First of all, I am familiar with William Julius Wilson's work at the University of Chicago. While Dr. Berry is correct that he does in fact describe the tremendous problems black males have getting jobs in Chicago, the study he conducted also involved Mexican immigrants and other Latino immigrants in Chicago.

And what he discovered in that study is that Mexican immigrants in fact do find jobs, they do develop networks that give them access to transportation, help them to learn about the availability of jobs. And after all with respect to immigrants, we are talking about a population that ostensibly also faces discrimination, often faces the increased burden of being unable to speak English, and is much lower skilled than are black males in Chicago.

Now, there may in fact be some prejudice and discrimination working on the part of employers who would prefer to hire Mexican immigrants than black males, and I think William Julius Wilson will conclude that there is. But it is not nearly as simple as Dr. Berry has suggested.

I think it is also important to note that the whole question of dual standards is really at the heart of this issue. And I know Mr. Taylor also referred to there not being dual standards and to having that information readily available. As I said, between 1981 and 1991, the Department of Labor, through its employment service, was using a race-normed test. Eighteen million persons a year were taking a race-normed test, 13 million persons were hired on the basis of that race-normed test. That was certainly done for the purposes of affirmative action, certainly not for other purposes.

In terms of enforcement under the Reagan administration, the highest court awards to victims of actual claims of discrimination came when Clarence Thomas was Chairman of the EEOC.

Now, to suggest that the EEOC is somehow nongovernmental, this is a Government agency.

Dr. BERRY. The EEOC is a swamp. It is a swamp.

Ms. CHAVEZ. I would agree with you, Dr. Berry, but the point is that to suggest that there was no Government enforcement at the time when the EEOC, under Clarence Thomas, was in fact filing suits, was in fact winning suits, and was in fact putting cash in the pockets of actual victims of discrimination seems to me ludicrous.

Mr. CANADY. Thank you. Thank you very much.

Mr. Frank.

Mr. FRANK. I have a very different recollection of the EEOC. I was chairman of an oversight subcommittee. I remember under Mr. Thomas at one point they just stopped altogether enforcing age discrimination, just flat out stopped. And we had to raise a lot of noise to get them to start it up again.

Let me also say that one of the problems that I have here is the gross exaggeration we deal with, when the chairman refers to a massive structure of preferences, I guess immigration comes to mind because he and I must be living in a different country. The notion that we have a massive structure of preferences for women, African-Americans, Hispanics in this country, is simply wrong.

The great bulk of people live their lives under-benefited or untouched in a negative way by such preferences. But let me ask you, now, I want to talk about police. We talk a lot about the negatives, we make public policy by bad stories. We have to start doing it by good stories.

I would like to ask all of the panelists what they think the effect of affirmative action has been on big city police departments. Let me start with Professor Graham.

Has that been a good or a bad thing?

Mr. GRAHAM. I don't know. I don't know anything about—

Mr. FRANK. OK. I'll go on to the next person. That is OK. It won't be on the exam, I promise.

Dr. Berry.

I would like to talk about police departments. I will go back to you with something else.

Dr. BERRY. The effect has been that women who were excluded before from even applying to be police officers have been able to become police officers. According to the police chiefs organization, it also has had a beneficial effect on law enforcement, because they have diversity, and they have people who come from the communities where they are trying to enforce law, and these police officers are as efficient as they were before. We can get to efficiency questions if you want to.

Mr. FRANK. Ms. Chavez.

Ms. CHAVEZ. It is difficult to know what the effect of affirmative action would be because we have not had a process whereby we—

Mr. FRANK. You have no opinion on the subject of police departments?

Ms. CHAVEZ. I do have an opinion. I believe it is extremely difficult to know what percentage of policemen, firemen, et cetera, would be in place now minus affirmative action, but with anti-discrimination laws in place. In other words, if you eliminated the

barriers. I will say that I think that when one hires on the basis of race——

Mr. FRANK. You have said that. I wanted a specific answer on police departments, not fire departments. We only have 5 minutes. Professor Custred.

Mr. CUSTRED. I can tell you what is happening under the rubric of affirmative action. We have banding.

Mr. FRANK. In police departments?

Mr. CUSTRED. Yes. You also have retroactive changing of exams.

Mr. FRANK. What has the effect been on police departments? Do you think the departments would be better or worse—would we have better or worse policing, or is there no effect? We are here in the business of making public policy.

I apologize for intruding what appears to some of you to be an irrelevant consideration. We have had affirmative action. One of the major areas it has taken place has been police departments.

Ms. Chavez, I only have 5 minutes, I am sorry. Mr. Chairman, I only have 5 minutes. If you want to give me extra time, fine. I asked you a question, I gave you time to answer it. I don't want to be filibuster.

Mr. Custred, anything further?

Mr. CUSTRED. No.

Mr. FRANK. Mr. Taylor.

Mr. TAYLOR. In 1970 there were 23,700 black people in police departments in this country. In 1990 there were 63,855, according to the statistics.

Now, how did that come about? It, certainly, came about through affirmative action. The Law Enforcement Assistance Act and the Revenue Sharing Act as administered had affirmative action requirements.

I represented Renault Robinson and the African-American Patrolmen's Trauma Association of Chicago along with other groups in a proceeding before the Law Enforcement Assistance Administration, which was then headed by Jares Leonard. At the end of that process, they adopted affirmative action requirements.

At that time, Mayor Daley, the old Mayor Daley, was losing up to hundreds of thousands of dollars a year in revenue-sharing funds because he wouldn't come into compliance with the fair employment requirements a court had imposed on the Chicago Police Department. When it got up to \$1 million, he threw in the sponge and agreed that he would follow the court's affirmative action remedy. Certainly, affirmative action played a role in this.

Mr. FRANK. I am struck by the fact that the critics, apparently, have nothing negative to note with regard to its effect on police departments. I say that because after the passage of the Civil Rights Act, very little happened in police departments for several years. We said no discrimination, but the big city police departments of this country remained overwhelmingly white male and overwhelmingly white male police departments are not as good at policing as police departments that have female and Hispanic and African-American and Asian-American police officers.

Because police departments that know better around reflect better and can deal with the community do better. Women police officers have been very helpful, and there was enormous resistance,

and I am convinced if it hadn't been for the presence of affirmative action, if you had stuck simply with nondiscrimination and you had to prove it, you would still have largely white police departments and largely white male police departments.

Every police expert I know of believes that our ability to ensure public safety has been substantially increased by affirmative action. I am struck by the fact that none of those who have a lot of abstract criticisms to make have anything bad to say about police departments.

Thank you, Mr. Chairman.

Mr. CANADY. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Dr. Berry, you went pretty fast and I may have misheard. Did you use the term "lily white" in your remarks?

Dr. BERRY. Yes.

Mr. HYDE. Would you tell me what the difference is between a white person and a lily-white person?

Dr. BERRY. It is just a term that is used; yes.

Mr. HYDE. Of endearment?

Dr. BERRY. I said it is a term that we use in the African-American community. It just means white. It is a southernism and a term we use in the African-American community. All white is what it means, instead of just some white. It means totally white as opposed to partially white. If it is totally white, it is lily white, in the way we talk.

Mr. HYDE. OK. You say on page 2 of your statement:

I, in particular, want to emphasize that although as a matter of history, the civil rights laws were passed to provide coverage to those Americans who lack protection. The civil rights laws protect all Americans. That protection, of course, extends to everyone, including white males.

That is your statement.

Now, about 10 years ago, you and Commissioner Cardina Ramirez, issued a statement accompanying the statement of the U.S. Commission on Civil Rights concerning *Firefighters v. Dodds*, and I am quoting from your statement then,

Civil rights laws were not passed to give civil rights protection to all Americans, as the majority of this Commission seems to believe. Instead, they were passed out of a recognition that some Americans already had protection, because they belonged to a favored group, and others, including blacks, Hispanics and women of all races, did not because they belonged to disfavored groups.

Now, apparently, you have changed your mind, and white males now are entitled to protection under our civil rights laws. Can you explain the difference?

Dr. BERRY. With all due respect, Mr. Chairman, what I said then was correct and what I say now is correct. I am a historian. I don't know any historian that doesn't believe——

Mr. HYDE. Does——

Dr. BERRY [continuing]. That the civil rights laws were passed——

Mr. HYDE. I surrender.

Dr. BERRY [continuing]. The civil rights laws were passed as a matter of historical record growing out of discrimination, that it occurred against all kinds of folks, African-Americans, and so on.

There is a history of this. And what I was addressing was that history.

I also have brought with me, because I expected to be asked this, the debate that took place at that time, including the press clips and all the rest of it, if you want to put it in the record.

But what I am stating at this time, again, so that people who deliberately, in my view, sometimes fail to understand what I said, will understand, and I have said it again, it is as a matter of history that—of course, the civil rights laws cover everybody once they are passed. And I want to say, while you asked me, Mr. Chairman, that affirmative action too has benefited white males.

In the history profession, we have a report which shows that because of affirmative action, when jobs were announced, recruitment took place, the old boy network of just some people finding out about good jobs was broken down, and ethnic diversity in our profession has changed as a result of affirmative action.

Mr. HYDE. Let me just make one more comment, not by way of a question, but it was earlier asked about the effect on police departments, and I will try to bring in some data from the city of Chicago which seems to be a favorite here, about recent examinations in which there was a great disparity in the grades, but to accomplish the goals of affirmative action, many people who did not do well suddenly did well, and I am confident that the effect on the morale of somebody who did very well and who got passed over because his skin wasn't the appropriate color, that his morale and the morale of many like him have suffered.

And that is going on today in the city of Chicago, because it is a matter of headlines. The mayor, the second Daley, is doing his best to keep everything calm and to satisfy this group and this group and this group, but in so doing there are some who have worked and studied very hard to get good grades who find that is not enough, they have the wrong color of skin, and that is what these hearings are all about, to find out if discrimination can remedy discrimination.

Mr. Taylor.

Mr. TAYLOR. Yes, Mr. Hyde; I think one of the things that ought to be looked into is the extent to which tests are predictive of the skills and the experience that you wish to measure.

Now, you know that in 1991, the Congress acted to restore the decision in *Griggs v. Duke Power Company*, which basically said that tests must be predictive, that they must serve a business necessity purpose.

Tests, certainly, are relevant. But they should not become talismanic. And that I think—

Mr. HYDE. I know what you are saying and I couldn't agree more. Some people are pretty smart and they are lousy at taking written tests. They have a lot of talent, a lot of ability, and you ought to look at the whole person. There is some question about that.

If I were picking sergeants or lieutenants, I would not only look at the written test, that would be part of it, but I would like to talk to them and interview them and see their record and all of that. But I ask you the question, should the color of their skin be a determining factor, not a factor but a determining factor?

Mr. TAYLOR. What the *Griggs* case said is that some kinds of tests have a disparate impact on people who have been denied advantages in the past, black people, Hispanic-Americans, in some cases women, and that where a test has that disparate impact, you have to look very, very closely at that test, and if it doesn't pass muster, then you have to find an alternative.

What I heard Mr. Frank saying a few minutes ago was that the experience in police departments around this country is that policing has significantly improved from the time when we began to have inclusive policies in police departments. And I would weigh that kind of experience, and there is evidence on it, very heavily as against the differences in test scores.

Mr. HYDE. You haven't answered my question, but it is nice hearing from you. Your hair is getting as white as mine.

Mr. TAYLOR. I will continue to try, Mr. Chairman.

Mr. HYDE. Lily white. That is two words.

Mr. CANADY. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I think I will refrain from asking any questions to any of the panelists other than the gentleman from California, whose name I am not sure I can pronounce properly.

Mr. Custred, I am fascinated by the wording of this California initiative, and I am wondering, is this the entire initiative?

Mr. CUSTRED. No; there were seven more sentences.

Mr. WATT. Is there something in the initiative that says what happens if in fact somebody is caught discriminating against—I mean, this initiative applies both ways, it applies to stop discrimination, and it applies to stop affirmative action to address discrimination, I take, so it applies both ways.

What happens if this initiative passes and somebody is caught discriminating on the basis of race?

Mr. CUSTRED. These laws are already on the books. Federal laws and State laws. And nothing in this initiative overturns any of those. So all of the laws that have been in effect before would remain in effect afterwards.

Mr. WATT. Well, let me ask the question again. What happens if after this initiative passes, somebody is caught discriminating?

Mr. CUSTRED. The same thing that would happen now if they are caught discriminating. And you are asking me to go through and tell you exactly—

Mr. WATT. I am trying to figure out if after this initiative were to pass, someone were to go into court and find that some employer, for example, had discriminated in employment, and they filed a lawsuit in the court to address that, would an affirmative remedy for that be in order directing that employer to address that discrimination by some affirmative step?

Mr. CUSTRED. Against that individual, yes. That is what I was trying say before, is that if any individual is discriminated against, it is that individual takes it to court; if the court finds in favor of the plaintiff, then, obviously, the employer who has discriminated against him is liable, just the way it is now.

Mr. WATT. What if a group—what if the evidence in that case documented that this was a practice and policy that this employer was applying to a group of people?

I am just not going to employ any people in my plant who are black. And I think it is rule 23, when I used to practice law, that is the class action rule. There was a class action lawsuit filed. Would the court still be free to give a class remedy?

Mr. CUSTRED. As I—was.

Mr. WATT. Or would each individual have to litigate that claim as an individual?

Mr. CUSTRED. Federal law trumps State law. As I understand the case law now, at least as it is termed by the attorney general of the State of California, is that remedies that race can be taken into account or sex or ethnicity in order to remedy that particular problem within that institution, but only if it does not trammel the rights of innocent third parties. And I think that is probably what would happen in this case.

Mr. WATT. So you are saying if that employer over the course of a year before the lawsuit comes to trial has employed no blacks, has employed 500 whites, there wouldn't be the option of the Federal court to initiate an affirmative action step to address those 500 people who are already in place, is that your understanding of where we would be?

Mr. CUSTRED. My understanding of this is that the Federal law would then kick in, obviously, and that the Federal law does give that kind of remedy. But what this is aimed at is it makes certain that you don't have proportional representation as a part of hiring or appropriation.

Mr. WATT. I am trying to figure out what it is aimed at. It seems to me that it is aimed at a massive subterfuge. Because I can't understand what the practical effect of it would be.

I see my time is out. I just—I am baffled.

Mr. CUSTRED. Would you like for me to answer that?

Mr. WATT. Yes, sir; I have been trying for 5 minutes to get you to answer that and I am still baffled.

Mr. CUSTRED. What we have in the State university system, for example, are hiring practices which focus on getting numbers up. The proportional representation in the university, and this overrides the needs of the different departments of the university, it overrides the interests of the students in many cases. This has nothing to do with redressing past wrongs. This is something totally different. This is what they call a diversity policy.

It just simply gets the numbers right.

Mr. WATT. What impact does it have if the prior policy has already had the effect of adversely affecting a class of people, a group of people?

Mr. CUSTRED. The California State university system has never discriminated against anyone. It has never been proven in court. And they have never admitted such.

These policies of hiring preferences that we note in the California State university system are something that have nothing to do with past discrimination in the university system.

Mr. FRANK. Will the gentleman yield?

Wouldn't your remedy ban any action of that sort even if they had proven past discrimination? So your remedy would ban it in either case.

Mr. CUSTRED. Our remedy would ban it insofar as—

Mr. FRANK. In either case, whatever the cause is, you would ban the corrective action no matter what the cause was. The cause would be irrelevant under your language.

Mr. WATT. I am not sure I understand this any better now. I, specifically, didn't want to ask Ms. Chavez any questions. I wanted—I mean, this is the gentleman who drafted this thing. I assume he understands the impact of it.

Ms. CHAVEZ. But I assume that you as a Member of Congress assume that——

Mr. WATT. If I had something to ask you, ma'am, I would ask you. I wanted to address a question so that I could try to get some understanding of it from his perspective.

Mr. CUSTRED. Well, I have explained it.

Mr. WATT. I will be happy to ask you a question the next time.

Ms. CHAVEZ. I thought you were asking for information. And you simply wanted a factual answer to your question, obviously, I was wrong.

Mr. WATT. If you would like for me to engage in some affirmative action toward you, I would be happy to on the next round of questions. Thank you.

Mr. SENSENBRENNER. Mr. Chairman, is there affirmative action for time on this side?

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman.

I want to thank you for having these hearings today. Before I begin, I ask unanimous consent to submit a short statement for the record and an attachment to that statement.

Mr. CANADY. Without objection.

[The prepared statement of Mr. Flanagan follows:]

PREPARED STATEMENT OF HON. MICHAEL PATRICK FLANAGAN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman:

Today we have before us an issue of escalating importance for millions of Americans across the country. However, it is probably in Chicago where the issue of affirmative action causes the most divisiveness among its citizens.

At the heart of this firestorm in Chicago is a program designed to create a more diverse police force by hiring more blacks, women, and other minorities throughout the department, especially in leadership positions. A police department which reflects the multi-culturalism of the City, of course, is a worthy goal. However, the question is can a program, no matter how well intentioned, be truly successful without infringing on the fundamental rights of all to fair and equal treatment under the Fourteenth Amendment? To be honest, Mr. Chairman, I have my doubts.

Mr. Chairman, let me share with you and the subcommittee a story of one person who has seen the harmful effects of reverse discrimination: Sergeant James McArdle, an 18-year veteran of the Chicago Police Department spent days studying for an exam his superiors said would determine which sergeants would be promoted to lieutenant and have their salaries raised by about \$6,000 a year.

- 2 -

After receiving his test scores, Sgt. McArdle was delighted to discover that he finished 56th out of 765 sergeants who took the exam. But when 67 promotions were announced on March 17th, he was not among them. Instead, 13 promotions were given to sergeants on the basis of "merit" rather than test scores. Those 13 sergeants -- five white, five black, and three Hispanic -- along with 54 of their colleagues who had the highest test scores, are now being trained for their new positions. On the other hand, Sgt. McArdle, with the support of the Chicago branch of the Fraternal Order of Police, has filed suit to overturn the decision by Police Superintendent Matt Rodriguez to promote those 13 sergeants on the basis of merit. Frankly, Mr. Chairman, I cannot blame him for challenging this policy.

I am sure Mr. McArdle is not the only person to experience the downside of Federal, State, and Municipal affirmative action policies. I also know Chicagoans are not the only people in America coping with these moral questions. With this in mind, I anticipate an informative and thought-provoking hearing today.

Mr. Chairman, before I yield back my time, I would like to thank you for scheduling this hearing today and not ignoring this controversial issue.

Mr. Chairman, I ask unanimous consent that I may be allowed to include into the Record an article from Newsweek titled "Battleground Chicago (Report from the Front: How Racial Preferences Work -- or Don't)."

Battleground Chicago

**Report from the Front:
How racial preferences
really work—or don't**

THE GERMANS AND the Irish came first. Then the Italians and the Poles. White ethnics were Chicago, really. They walked the beat, collected the trash, built the city. But Chicago's most controversial migration happened later, during and after World War II. Hundreds of thousands of Southern blacks, fleeing enforced segregation, moved in. And Chicago, after absorbing so many other newcomers, resisted. The stage, familiar in cities both North and South, was set: standoffish whites and shut-out blacks. Mayor Richard J. Daley, whose 21-year reign began in 1955, kept African-Americans out of his legendary machine, closing off contracts and patronage jobs.

Then came another era, one first of civil rights, later of quotas and set-asides. And blacks tried to regain lost ground—sometimes at the expense of whites.



MARK SEGAL—TONY STONE

The state of affirmative action in Chicago—long-frustrated blacks, newly frustrated whites—tells us much about the escalating national debate over racial and gender preferences in American life.

As always, it is a debate where both sides have a point, yet passionate polemics from the right and the left fail to

explain how affirmative action really works. To cut through the tangle, NEWSWEEK examined four Chicago institutions (the city police, a university, a minority contractor and a major company). At times, affirmative action means rigid quotas, which are simultaneously effective and destructive. In some cases, the profit motive drives aggressive minority recruitment. In others, success results only through an unusual convergence of impossible-to-legislate human factors. Here are the real faces—the real winners and losers—beyond the political caricatures.



Race in the ranks: Officer Gerald Hamilton on the job in Chicago

The Police: Minority numbers are up, but getting there turns cop against cop

OF THE 4,700 CHICAGO POLICE OFFICERS WHO TOOK THE sergeant's exam last year, 43 percent were African-American. Yet only five of the 114 cops who won promotion were black.

Why so few? Some white police officers said years of police hiring preferences had created a class of black and Hispanic officers who just weren't as talented as the whites. Blacks countered that the test itself was biased—and that the graders were racist. Gerald Hamilton, a college graduate with 10 years on the force, spent nearly six months getting ready for the exam, joining a study group at night and investing \$100 on outside testing materials. After the test's first two parts—a written section and an "in-basket" exercise that simulates on-the-job decision making—Hamilton ranked 313th, which was high enough for promotion. Then came the tape-recorded orals. Says Hamilton: "All of a sudden, my black voice is on that tape—and my number falls to 1,000."

In the old days, Hamilton might still have made sergeant. From

1976 to '88 Chicago operated under a court-ordered affirmative action plan that imposed rigid quotas on hiring and promotions. The quotas angered white cops, provoking litigation and causing dissension in the police department that remains today. "It's a racial tinderbox," says a former aide to Mayor Richard M. Daley.

But by another measure, race and gender preferences in the Chicago police department have clearly worked. Since 1973 the force's share of minorities (mostly blacks and Hispanics) has jumped from 17 to 37 percent, and the cadre of women officers has grown from 1 percent to 17 percent. Diversity has helped relations with the black and Hispanic communities; it may even have averted some Rodney King incidents. The experience of the Chicago force—more minorities and more racial tension—raises an essential question about affirmative action: what is success?

The need for affirmative action in city employment is a legacy of the mayor's father, the late Richard J. Daley, and his patronage-based machine. "Our police and fire departments in the 1970s were closed clubs," says Judson Miner, the top city-hall lawyer in the late '80s. "You got in based on who you knew." The Justice Department sued, and in 1976 a federal judge ordered that 42 percent of all new hires, and 40 percent of all officers promoted to sergeant, had to be

On the Force

If raw numbers equal success in affirmative action, Chicago's police department is doing as well as or better than an average of some of the country's largest forces.

Police-force average for 50 largest U.S. cities

MINORITY REPRESENTATION AS A PERCENT OF TOTAL FORCE		
	1983	1978
Black	12.4%	17.3%
Hispanic	6.8	8.3
Women	n.a.	11.6

Chicago police

MINORITY REPRESENTATION AS A PERCENT OF TOTAL FORCE		
	1983	1978
Black	20.1%	24.8%
Hispanic	3.4	7.5
Women	n.a.	16.0

SOURCE: UNIVERSITY OF NEBRASKA AT OMAHA, CRIMINAL JUSTICE DEPARTMENT

NATIONAL AFFAIRS

minorities. "Abhorrent to all Americans," the elder Daley said of the court ruling.

Officers began turning on each other. When Vance Kimber made sergeant in 1985, a white cop approached him and said, "You got my stripes." Kimber, a 10-year veteran of policing the city's toughest housing projects, shot back defiantly. "I earned it." One white officer remembers seeing a black sergeant hesitate before making a crucial decision at a crime scene. That led other white cops to taunt him—to his face—as a "quota sergeant." In 1988 a group of white officers sued the city for reverse discrimination, claiming they had been denied promotions they deserved. John Apel's strong scores placed him 360th on the 1985 sergeant's promotion list, but after blacks and Hispanics were moved up, he fell to 750. Apel, now 47, was crushed. "I did everything but go buy the uniform," he says. "Time has run out for me now. I'm ruined."

Daley junior came into office in 1989 determined to defuse the racial politics. He hired a consultant to devise a new sergeant's exam to increase the number of blacks and Hispanics without reviving quotas. It didn't work: those were the tests that led to only five minority promotions and infuriated cops like Gerald Hamilton. Some 300 African-American and Hispanic officers sued, claiming the dismal results proved the test was flawed. In a city that is 39 percent minority, they argued, blacks and Hispanics must make up more than 29 percent of the 1,183 sergeants. "I try not to be paranoid," says Cynthia McCarroll, an eight-year veteran. "But what are they trying to tell us? That minorities are not capable of being sergeant?"

Last month, Daley thought he discovered a middle way. The police department announced that 54 sergeants (virtually all whites) would be promoted to lieutenant on the basis of their test scores, and 13 other sergeants—including 8 minorities—would be elevated based on "merit" recommendations. The compromise backfired, generating a fresh round of anger on both sides. Many blacks urged returning to rigid numerical formulas. White cops who had been passed over for lieutenant to make room for the minority "merit" promotions promptly went to court. Daley aides now shrug. "Every time we promote, whites or blacks—or both—sue us," says legal counsel Susan Sher. Clearly, politicians cannot trick people into thinking affirmative action is cost-free by using pseudoscientific tests or formulas. All they can do is explicitly make the case that the benefits of a representative police force outweigh the costs.

BOB COHN

On Campus

While the nation's four-year schools on the whole have made marginal improvements since the 1970s, Northwestern's black enrollment has actually declined

U.S. college enrollment
four-year colleges and
universities

	1976	1993
White	84.4%	77.0%
Black	8.5	9.0
Hispanic	2.4	4.7
Asian	1.7	4.7
American Indian	.5	.0

SOURCE: NATIONAL CENTER FOR
EDUCATION STATISTICS



The University: Losing ground in the scramble for qualified black applicants

WITH ITS STATELY CAMPUS ALONG LAKE MICHIGAN, Northwestern University stands miles apart from downtown Chicago and the politics of black and white. The university first opened its doors to blacks more than 100 years ago, and it has been a leader in recruiting African-American students since the mid-1960s. Northwestern's black alumni, now numbering in the thousands, have gone on to succeed in business and the professions, and both they and the university itself regard NU's commitment to educating the new generation of upwardly mobile blacks as a proud and vital tradition. But that tradition is now in jeopardy—for after nearly three decades of affirmative action, the percentage of blacks in the Northwestern student body is no longer rising. In fact, it is slowly going down.

Specifically, blacks now constitute 8.1 percent of Northwestern's full-time undergraduate student body, down from 8.7 percent in 1987 and 11 percent for the entering freshman class back in 1975. While university officials profess no great concern about the current figure, the trend is clearly worrisome. Unless the drift can be reversed, Northwestern could someday revert to what it was in the 1950s: a prestige school that, except for the Asian-Americans who now make up 17 percent of its student body, verges on lily-white. That possibility is simply "unthinkable," says associate provost Rebecca Dixon, because Northwestern wants "a critical mass of any group that is of significance to society."

So the question is: how could a school that has been so committed to affirmative action wind up losing ground? One answer is that America's public-school systems simply do not produce enough African-American students who are ready for top-tier universities. In 1993, out of approximately 400,000 black high-school seniors

51% say local police forces should give minorities preference in hiring so that the police force would have the same racial makeup as the community

44% say local police forces should not give minorities preference

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nationwide, only 1,644 got combined scores of 1200 or better on the SATs, and only 8,256 scored between 1000 and 1200.

The shortage of high-scoring black kids forces colleges to compete for minority applicants—and in recent years, Northwestern has been outbid by schools like Duke (8.8 percent black), Michigan (8.4 percent) and even by the University of Illinois (7.1 percent). The high cost of higher education plays a part. Northwestern, the only private school in the Big Ten, costs upwards of \$22,000 a year, and restricts grant aid to strictly defined financial need. Some of its competitors, though, offer "merit" scholarships to high-scoring black kids. Competition from historically black colleges and universities is increasing. Four years at a highly competitive, majority-white institution like Northwestern can be stressful. Many blacks choose majority-black schools instead.

And the Northwestern campus is no one's vision of interracial collegiality. Blacks and whites eat at separate tables and lead separate social lives, as they do at most big schools. Virtually all black undergraduates belong to a group called For Members Only (FMO), which is both a social and a political organization. When FMO staged a silent march to protest alleged misconduct by campus police last spring, the reaction from many white undergraduates was something like a shrug. One black undergraduate describes race relations as "a cold war." A 1986 white graduate puts it differently: "I don't remember any overt racial hostilities. You need a certain amount of contact to have hostilities."

Affirmative action at Northwestern has never been easy. In 1991 a campus conservative publication called *The Northwestern Review* claimed that the median SAT score for black students was 100 to 150 points below the NU undergraduate average, which was then about 1270. Rebecca Dixon takes issue with the charge that NU is being "unfair" to other groups by admitting blacks with lower scores. Dixon says NU's black students can and do compete academically—and that fully 79 percent graduate, which is the real bottom line.

The reality of minority admissions, at Northwestern and many of its competitor institutions, is marketing, not quotas. (The mere fact that Northwestern's numbers are slipping seems to show there is no quota there.) First, NU buys a list of black high-school seniors who scored over a certain level on the SATs. School officials won't reveal the cut-off point. But the ballpark figure for this year's African-American "prospect pool" is 11,000 kids nationwide, and that number suggests a cutoff somewhere around 1,000. The admissions office direct-mails NU brochures to all 11,000 and sends recruiters to 74 high schools around the country for interviews. After all that, NU this year got 565 applications from blacks—but its "yield" next fall will probably be only about 120 blacks in an entering class of 1,850.

If the university wants to reverse the slide in its black enrollment, it could offer more generous financial aid or a higher

cut-off point, or both. It could also offer tutoring or remedial courses to black students whose preparation for college-level work is less than complete. None of these options is likely to be popular at a school that is aggressively moving up in the pecking order of American higher education, and it is not clear that Northwestern will change its policies at all. But its dilemma suggests that affirmative action has met the law of diminishing returns—and that Americans more than ever should turn to fixing their public schools.

TOM MORGANTHAU

The Contractor: Minority businessmen need white escorts to get in the door

CONSERVATIVES DERIDE THEM AS GROSSLY PREFERENTIAL treatment for minorities, liberals scoff that they're welfare for fat cats—and Bill Clinton says minority set-asides are one form of affirmative action that may have to go. But Larry Huggins says set-asides are the main reason for his success in the Chicago building trades, and he is a guy who should know. Now 45, Huggins grew up in a single-parent family and never went college. He started out in the 1970s as a painting contractor on Chicago's South Side, went bankrupt and fought his way back. Today his firm, Riteway Construction Services, Inc., is a \$14 million-a-year roofing, painting and concrete-pouring business with a \$3.5 million payroll and 120 employees. "Now is not the time to cut out affirmative action," he says. "We're just getting to the point where we're about to make a difference."

The Larry Huggins story contains two lessons that may surprise both critics and supporters of minority set-asides. The first is that set-asides can help a shrewd, determined black man rise from economic marginality to more-than-modest success. The second is that a good set-aside program consists of much more than dumping preferential contracts on people of color. Huggins and Riteway had little chance of success without an effective

Blue Collar

The number of minority- and women-owned construction firms in Chicago grew dramatically during the 1980s, just as it did throughout the rest of the country.

Construction firms owned by minorities		
	U.S.	CHICAGO
1972	39,875	573
1987	107,850	1,850

Construction firms owned by women		
	U.S.	CHICAGO
1972	14,884	348
1987	94,308	1,610

SOURCE: CENSUS BUREAU



Social contract:
Huggins, 45, is
an owner of
Riteway.

NATIONAL AFFAIRS

NEWSWEEK POLL

48% approve of government agencies setting aside 5% to 25% of their contracts for minority-owned businesses
44% disapprove of that policy

THE NEWSWEEK POLL
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"mentor-protégé" relationship with a white-owned Chicago company, Tribco Construction Co. Tribco and its president, Robert McCollam, provided Rite-way with technical advice, hands-on supervision and crucial support in its dealings with the banks.

McCollam's business motive was simply to get a share of city contracts under the set-aside program. But his decision to help Huggins was based on a working relationship that dated back to 1978. "Larry was one of the most cooperative guys I ever met, as far as his work as subcontractor went," McCollam says. "He always got the job done on time, never griped. I thought, who better could we find?"

That three-year mentoring relationship ended in 1991, and Huggins is on his own today. He and Tribco still do business: they are partners in a joint venture to pour the concrete for an expansion of the Chicago Board of Trade. But Tribco does business with Rite-way's competitors, and Rite-way does business with Tribco's. Huggins now has \$16 million worth of work lined up for 1995.

He also has a ready answer for those who say set-asides are charity for the black middle class. Huggins takes pride in the fact that fully \$2.5 million of his \$3.5 million payroll went into Chicago's black community. That's trickle-down economics. But given that his lowest-paid workers get \$900 a week and full union benefits, the trickle is nothing to sneeze at. "We don't turn around and discriminate against white workers," Huggins says. "I feel I have a moral responsibility to train people from our community, but the bottom line is, your best work force is a diverse work force. They could care less whether they work for a black firm, a Hispanic firm or a white firm." Contracting is a tough-guy business, and through the '70s neither the big construction firms nor the unions were prepared to give anything away to blacks. Some still aren't: a construction-industry spokesman recently charged that the use of minority and women's firms drives up costs on city projects. It probably does—set-asides short-circuit true competitive bidding.

But supporters of the program say the minority firms' share of the pie is small, and the city makes no apologies. "We don't care what Clinton does," says Gery Chico, Mayor Richard M. Daley's chief of staff. "We're not going to change a thing."

VERN E. SMITH

The Corporation: Allstate saw the light when it started following the money

RON MCNEIL, THEN A YOUNG BLACK EXECUTIVE, WILL never forget his first day at Allstate Insurance in 1976. In those days, being an "Allstater" didn't just mean you worked for the nation's second largest insurer. It also meant you were virtually always a white, male, spit-and-polish suburbanite. Women who were with the company were not permitted to smoke at their desks. In the cafeteria the men sat with the men, the women sat with the women and the minorities... well, you get the picture. "I was told by one guy that I'd never make

it at Allstate," McNeil remembers, "because I didn't play golf."

Since then, Allstate's work force has changed—and with it, the company's corporate culture. Like most American companies during the last two decades, the Northbrook, Ill.-based firm (annual revenues: \$21 billion) has painstakingly increased the number of minorities and women on its staff—sometimes angering white men who are passed over. But what's most striking about Allstate's affirmative action is that it wasn't forced by law but by the company's search for new customers in a highly competitive industry.

Traditional markets: In the 1970s, Allstate had a problem. Insurers were saturating the traditional, largely white rural and suburban markets. Hunting new sales, the company focused on cities—especially the burgeoning minority working and middle classes. And selling insurance in minority neighborhoods, the company figured, was a job particularly well suited to minorities, just as selling insurance in the suburbs was best done by hometown agents who knew their customers from Little League and the Lions Club.

So Allstate stepped up recruiting at black colleges. Managers were bombarded with seminars about the virtues of minority hiring. In the 1980s the company voluntarily set aside one third of its



DAVID WALLBERG FOR NEWSWEEK

promotions and a number of entry-level hires (depending on an office's location) for minorities and women. The results: the number of black agents doubled, from 5.3 percent in 1975 to 10.6 percent today. Companywide, black employment rose from 9.5 percent to 15 percent. And 25 percent of the company's officers are women or minorities today, compared with a paltry 1.7 percent 20 years ago.

While other corporations' bouts with affirmative action have been more rancorous, such numbers have been good for Allstate. The company is now the No. 1 insurer in New York City and, tellingly, in Chicago's black community. That's because of people like Cheryl Green, a Chicago South Side native who came home five years ago to peddle Allstate. She immediately did a brisk business with old friends and neighbors. Last December she sent out a direct-mail brochure featuring a photograph of herself: the response has been tremendous. She now ranks in the top 1 percent of sales agents nationwide. "If there was a white agent across the street," says Green, "I think I'd get most of the business because I'm an African-American in an African-

White Collar

It may have caused some hard feelings, but Allstate's self-imposed diversity program has changed the look of its work force at a faster rate than the rest of white-collar America

Allstate workers, by race

	1975	1995
White	87.3%	76.5%
Black	9.5	14.8

U.S. white-collar workers, by race

	1975	1994
White	82.3%	80.7%
Black	7.7	10.3

SOURCES: ALLSTATE (DATA FOR WHITES AND BLACKS DOES NOT INCLUDE OTHER ETHNIC GROUPS); BUREAU OF LABOR STATISTICS (DATA FOR WHITES AND BLACKS INCLUDES HISPANIC, ASIAN AND OTHER ETHNIC GROUPS)

American community... and African-Americans want to support one another."

But on their way to diversity, the "Good Hands" people have occasionally dropped the ball. In 1976 the company was slapped with a class-action lawsuit filed on behalf of 3,100 women claiming that Allstate systematically underpaid its female agents. (Some women were paid \$175 less per month than men in the mid-'70s.) The company, admitting no wrongdoing, settled the case for \$5 million. Last year the company was accused of redlining—refusing to sell or overcharging for insurance—in minority neighborhoods in Atlanta, Chicago, Milwaukee and Louisville. Allstate denies the charges, adding that its heavy presence in urban markets leaves it open to redlining accusations. (Though unrelated, Allstate is caught up in another controversy about hiring a consultant who used Church of Scientology methods to train agents.)

Affirmative action's winners are obvious: those the company has hired and promoted. The losers are the white males—some medi-

NEWSWEEK POLL

45% think blacks' status in the workplace would stay about the same without affirmative action
30% think it would get worse; 19% think it would get better

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cre, some talented—who would have risen faster under the old regime. They include respected Allstate executives like Andy Rieder, who says that if it weren't for affirmative action he probably would be an officer of the company today. Though he supports the principle of diversity, that hasn't stopped the soul-searching—and the quiet torment—when he's been passed over for promotion. "It's easier to rationalize that someone got a job because of some preferential treatment," he says. "I've done that, and so have others at Allstate."

The disappearance of government-sanctioned affirmative action could have little consequence if companies realize what Allstate realized: hiring and promoting minorities can be good for the bottom line. "Diversity is a business issue, not a social issue, at Allstate," says Ron McNeil. He should know. He's risen to be the company's highest-ranking black. And what about that advice he got 20 years ago? "I still don't play golf," he says. Not that it matters anymore. Because today he sits on the company's board of directors.

PETER ANNI

How to Help the 'Truly Disadvantaged'

IN RECENT CLOSED-DOOR meetings, Bill Clinton and Al Gore have put a challenge to some of the nation's top policy experts: are there ways minorities can advance in life without racial preferences? Among the most influential of these presidential advisers is William Julius Wilson, a liberal professor from the University of Chicago, who has long viewed affirmative action with suspicion. Wilson argues that current policies mostly benefit well-educated members of the black middle class. The "truly disadvantaged," as he calls them, have not been helped nearly as much.

Years before affirmative action was in jeopardy, Wilson advocated race-neutral policies to alleviate inequality by getting the disadvantaged—of all races—into good jobs. His ideas, drawn from years of research into Chicago poverty, get at crucial factors—some profound, some strikingly mundane—often overlooked in the debate over affirmative action:

Shuttle buses. There are low-skill jobs available for the urban poor. The problem is, the jobs are often in suburban industrial parks, and it's tough for applicants to get to such

places from the inner city. Subsidized car pools, shuttle buses or new public-transit lines would help connect the very poor with jobs.

Teach English as a job skill. City schools rarely treat lan-

how to be articulate.

Make malcontents hit the road. Young black males often complain that today's service-sector jobs, such as taking telephone orders, demean them. Those workers often

rules have changed since their parents first looked for work. One common misconception is that the job with the highest starting pay is the best job, since the seniority system will inflate the wages once you're in the door. Wilson says job counselors should teach young people that employers reward performance over seniority. And hauling office mail at IBM offers more chances for advancement than a better-paying job in a foundry.

Put career ahead of sex. Teen pregnancy all but dooms the job prospects of most young women. Wilson has found that if you get teenage girls to focus on their careers as early as ninth grade, they're less likely to have babies. That's because they may not be inclined to throw it all away if they have some real sense of what "it" might be. At Chicago's all-black Fenger High School, a two-year-old program emphasizing schoolwork as a means to a good job—not just graduation—has had dramatic results. Not one of the girls has become pregnant.

JOHN MCCORMICK



TODD BUCHANAN

Sense and solutions: Chicago's William Julius Wilson

guage and grammar as essential to economic advancement. "English and all that ain't really necessary in the job market," a data-entry clerk told Wilson's researchers. But all service-sector jobs and even most manufacturing jobs require better communications skills than did low-wage jobs of an earlier generation. Tutoring programs should worry not only about occupational skills like welding but also about teaching young people

don't do a very good job anyway; both black and white employers complain that they have bad attitudes. Rather than forcing rebels into have-a-nice-day-type jobs, Wilson suggests training them for work that offers more independence. Two likely targets: long-haul trucking and the construction trades.

Don't sniff at low pay. Inner-city youths are often so isolated from job markets that they don't know how much the

Mr. FLANAGAN. I have a question for the entire panel. I want to go back to the police again, with Mr. Frank and Mr. Hyde's earlier commentary.

Let me give you some facts of what happened in Chicago and what is currently being litigated. There were 67 promotions to be made from sergeant to lieutenant in the city of Chicago system. All but about 20 percent were made based on the test scores and other criteria resulting in a total test score. The bottom 20 percent were cut off and the remaining approximately 13 promotions were made, 5 white, 5 black, 3 Hispanic, the racial mix of Chicago.

Surfacely, this looks like a quota being imposed on 20 percent of the promotions to give a racial mix to the recommendations so that it seems that a racial equivalence is being hired. Sergeant McArdle finished 56 on this point system and is in that bottom 20 percent, and is currently suing. The Fraternal Order of Police has joined him.

My question for the panel is, these 13 who were hired on the basis of merit, and that is what it was called, these were merit promotions even though their test scores were far below the 56 in front of them, is this not a quota system? And is this what affirmative action wants to do?

The goals of hiring good people for good jobs that are qualified and are also of color because they have been denied in the past a worthy and laudable aim.

But to have the color or the racial mix of the community be the governing aspect in at least in this case a percentage of hiring appears to me to have the opposite result of the reason affirmative action was started.

Let me start with Mr. Taylor and work our way down. Have we not got a quota here? Is this a good thing?

Mr. TAYLOR. Not to my knowledge, Congressman Flanagan. First of all, by way of background, I think if you want to look at this case carefully you should look at the background and the history and the exclusion of minorities from the Chicago Police Department for many, many years, against which the current remedies are being employed.

I think the question is whether the system that has been adopted by the authorities in Chicago is yielding police sergeants or lieutenants who are qualified to carry out the duties of their office.

Mr. FLANAGAN. Mr. Taylor, my question is much simpler. Is this a quota system?

Mr. TAYLOR. I will answer it directly. It is not a quota system. I do not know of any predetermined number of people that the Chicago Police Department is endeavoring to have in these positions. Nor do I know or believe that the Chicago Police Department is endeavoring to put in these positions anybody who is not qualified to carry out the job.

If you had those facts, then you would have a quota system, but do you not have those facts, at least not until a court determines that those are the facts, and I think it will play out in the judicial system in a way that will fairly protect everybody. But you do not have a quota system.

Mr. FLANAGAN. You may be right, it may play out like a quota system, but if it looks like a duck and walks like a duck and talks

like a duck, it sure is a duck. If you cut off 20 percent and hire on the racial mix of the city, apposite to the other scores that were given, if you take the top 56, cut out the bottom 20 percent, it looks like you are trying to bleed in a quota to a certain percentage level of the police force. Maybe this is a good thing, maybe it is a bad thing, I don't know. I am just trying to identify it.

Mr. TAYLOR. You did not say there was a predetermined level—

Mr. CANADY. Will the gentleman yield?

What do you think a quota is? Would you define quota?

Mr. TAYLOR. I think a quota, in this context, is using race or ethnicity or gender to determine that you will have a particular percentage of a particular group in a job that is unrelated to their qualifications to carry out the responsibilities of office. The court said in the *Bakke* case, the court said in other cases, you cannot separate out a group and say we are reserving 16 places for Hispanics or blacks or someone else.

And I have no information that—

Mr. FLANAGAN. The fact that it came out after as opposed to before does not change it as a quota.

Let's go to one more panelist with your indulgence, Mr. Chairman.

Mr. GRAHAM. I don't think asking whether it is a quota system or not is the right question. We have been arguing that way for 20 years. I think the question is whether it shows a group preference and why, and what that means.

Frankly, on the police question, I have sympathies toward Mr. Frank's position, for reasons he expressed. I don't know enough about the Chicago position. I have just read the newspapers.

So I won't judge that. But I think there are circumstances when the preference because of group membership is the right preference and that we need to have blacks and other minorities and women on our police forces.

I think the larger question, though, is the problem of designated groups bringing a presumption of disadvantage. That is what we have had. An automatic presumption of disadvantage, when what we have had in fact is success over time so that the black middle class has tripled since 1960, the underclass has gone down, so we have wide variations within groups over prosperity, and yet we automatically—let me just give you one example, if I may. It is about an Indonesian woman whose name was not disclosed who migrated here in the 1980's and applied to the Small Business Administration for help under the SBA's affirmative action program.

Mr. FLANAGAN. Mr. Graham, what does this have to do with the police department? I was seeking out some questions in regard to this particular—and I am way over time.

Dr. Berry.

Mr. CANADY. We are being very liberal with the time today, but I think we have gotten a little more liberal. There will be an opportunity to respond.

Dr. BERRY. Can I have 5 of your seconds?

You said this guy made 56 on the police exam? How come he only made No. 56? What was wrong with him? Why was his score so low?

That is all I want to know. Thank you.

Mr. FLANAGAN. Thank you. There were 700 and some odd who scored below him.

Dr. BERRY. 56. My goodness.

Mr. SERRANO. That is not off of my time, is it?

Mr. CANADY. You will get extra.

Mr. SERRANO. Let me ask all five of you a question.

Am I assuming correctly that you came here today because there was a hearing on affirmative action and you believe that at the root of the issue of affirmative action today, in this last couple of months, is in fact the issue of how affirmative action programs are conducted? Am I assuming that correctly? Is there anyone who disagrees with me?

Dr. BERRY. I disagree with you. I think the hearing is about politics. I think the hearing is not about facts. I think the hearing is not about what is really happening. I think it is about politics.

Mr. SERRANO. I hate to break your heart also. There would not be a hearing today if affirmative action had not become a hot button issue to scapegoat, to pinpoint, to bring back feelings that have perhaps left us for some time or at least have been hidden for some time. And affirmative action is an excellent way, for 30 seconds on the 6 news, to say that something is wrong with the society, and that what is wrong is that white males are being hurt by some college student who got to go to college in California, or some Latino who may apply for a job somewhere in Brooklyn or for the Federal Government.

And if any of you really believe that you are here because of affirmative action, I think you really should do a lot of homework. You are here because, as it was in the 1950's and 1940's and 1930's, we now have a couple of ways to scapegoat people in this country and to begin a class war again and a racial war.

Whether or not that works and whether or not the people who are being hurt the most will take up the fight remains to be seen. But, for instance, I would ask people, where are the millionaires in the African-American community and in the Latino community that have ripped off all these white males for the last 30 years? I don't see them. Does the preference—

Ms. CHAVEZ. Do we ever get to answer your questions?

Mr. SERRANO. No, and unless you stop interrupting me, you may not answer at all. Believe me, I am amazed, Ms. Chavez, that you and I come from similar backgrounds and disagree on so much in life. But I guess that is the beauty of being alive.

I also wonder how many college students in the minority community have graduated at the expense of some white student never graduating. I don't know that anybody has those figures, because I don't know that white students are kept from appearing in colleges.

The life I live, the world I live in, when I go to the House floor, I see mostly white males. When I am interviewed on a daily basis, and I am lucky it is on a daily basis, it is mostly by white folks. When I go before a TV camera, most of the people around the TV camera, nice people that they are, are white.

I don't understand what the complaint is about. What is it that has gone wrong and how many people have been hurt? And I will ask one question, to the first gentleman.

You said very bravely, and I know you said it not to be sarcastic, that you identify yourself as a white southern male. Do you believe that white southern males have accepted integration and the legality behind that fully?

Mr. GRAHAM. I think white southerners have accepted long ago the Civil Rights Act and nondiscrimination. If you mean by accepted integration in schools, nowhere in the country have we had very successful integration in schools. I don't think whites in the South differ particularly. But that is an entirely different and complicated question.

Mr. SERRANO. No, it isn't, it really is not, because I believe there are whites in the North who haven't accepted the way society has changed or in the West or in the Southwest or anywhere in this country. And when someone comes and tells them the reason you may not have two cars in the future but rather one is because something happened in this society giving preference to those people, that has taken one car away from you. And if your son has a more difficult time finishing college, perhaps because of his grades, somehow we will find a way to tell you it is because someone else took a seat that maybe would have made his grades higher.

I would submit to you, sir, that we have not truly accepted integration—the only place we have accepted it, which we always hold up, is in the military, and that is because it is acceptable in this country to serve and to die for your country regardless of what color you are. Other than that, I am not sure that we have accepted anything at all.

Ms. CHAVEZ. I could just respond, Mr. Serrano, very briefly, because you asked specifically whether or not we believe that there are any people who suffer. And I will use a personal example.

When my son graduated from high school, my oldest child graduated from high school, he received offers of substantial scholarships from a variety of institutions, one of them a private college in Pennsylvania, which, if my recollection is correct, was about a \$25,000 a year scholarship.

We live in one of the most affluent communities in America. He has never faced a day of discrimination in his life, and indeed his ethnicity is only one-quarter Hispanic, yet that university, sight unseen, without his having applied, simply on the basis of receiving his SAT scores—because he probably checked the Hispanic box at the bottom of the SAT's—that university was willing to give him on the basis of that little box, that little check, a \$25,000 a year scholarship.

There are children in the State of Pennsylvania—

Mr. SERRANO. Did he take it?

Ms. CHAVEZ [continuing]. There are children in the State of Pennsylvania, white children of unemployed steelworkers, children of immigrants from Poland and Italy and elsewhere, who do not have those advantages and who are substantially more disadvantaged economically and socially than my son.

And do I think it is wrong for my son, on the basis of one-quarter Hispanic ethnicity, to be given that kind of preference? Yes, I do.

And you will be pleased to know we turned down all the scholarships offered.

Dr. BERRY. May I comment on that? I want to comment on Ms. Chavez's—I am in Pennsylvania, and in point of fact, if——

Mr. CANADY. Would you please suspend for a moment? I would appreciate it.

The members of the audience, we are pleased to have you here, but if you would please refrain from any reactions to the Members or to the members of the panel when they are making statements, we would appreciate that very much.

If you would like to continue, you may continue.

Dr. BERRY. Excuse me, Mr. Chairman. I was only about to say that in Pennsylvania, if there are poor steelworkers or unemployed anybody whose children need to get into college and they are admitted to it, there are scholarships available, there is student aid available. In fact, the institution where I am from, we have need-blind admissions so if you get admitted, you can get funded.

So this issue of contending with the unemployed steelworker up against the black guy who got in or the Latino—and it is up to everyone, if they can afford to pay for their children's education, and they are offered scholarships and fellowships, it is in their best interests and we would expect them as a matter of ethics not to.

What this school was trying to do was to increase diversity at that school. If your son can pay for it, that is great. If he couldn't have paid for it, that is great. But there are not thousands of unemployed steelworkers' children and Italian firefighters' children. We have Federal student aid programs; colleges and universities have grants and scholarships available. They are not pitted one against the other.

Mr. FRANK. That was a purely private university. There was no government involved in that.

Ms. CHAVEZ. The particular incident——

Mr. FRANK. It had nothing to do with the Government.

Ms. CHAVEZ. There were other public institutions which made offers.

Mr. CANADY. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I have been on this committee for a long, long period of time and perhaps I have got an institutional memory which term limits would wipe out, as does Mr. Hyde. Mr. Hyde and I, I think, have matured into majority status, and I notice, Ms. Berry, you are maturing as well, because Mr. Hyde did point out that your statement today said that protection goes from the civil rights laws to white males, which was in direct contradiction to the statements that you made in testimony before this committee 11 years ago. So, welcome to the American Association of Unretired Civil Rights Debaters. I have a question of members of the panel.

In my hometown in Milwaukee we have a pioneering parental choice program, where the State gives money—vouchers, if you will—to parents who enroll their children in private schools as a way of getting out of the Milwaukee public school system.

According to the most recent statistics, in the Milwaukee public schools, low-income children have a 15-percent graduation rate. And please note that Milwaukee has been under a mandatory

school busing order for the last 20 years. In the private schools that utilize the choice program, they have a 95 percent graduation rate. The Wisconsin State auditor reports that 95 percent of the children in the choice program are black or Hispanic.

Isn't this preferable to race-based affirmative action?

Mr. TAYLOR. I will take a crack at that, Mr. Sensenbrenner. If there were a hearing on choice in the public schools, I think there are a great many things that could be said. One is that private schools have and continue to have the advantage of being selective in their choices of students.

Mr. SENSENBRENNER. That is not the case in Milwaukee, because there is not a discrimination provision that applies to the schools that receive the State vouchers.

Mr. TAYLOR. For example, in Milwaukee these private schools got a dispensation that they would not be responsible for educating children who have special education needs. If they can't be——

Mr. SENSENBRENNER. You are not answering my question. My question is, isn't the choice program better than affirmative action given the fact that the choice schools have a 95-percent graduation rate amongst poor children or children from poor families, and the public schools have a 15-percent graduation rate amongst children from poor families?

Now, the difference in that, Mr. Taylor, honestly, cannot be attributed to the number of special education children, because no school district, including Milwaukee, has got 80 percent of the children in special education programs.

Mr. TAYLOR. Let me say, since we are not going to settle this one today——

Mr. SENSENBRENNER. Then maybe we ought to go on to other——

Mr. TAYLOR. Let me answer your question. Unless you don't want to let me answer your question, I will answer your question——

Mr. SENSENBRENNER. Excuse me, sir. I am adopting the Frank rule when people say "I don't want to answer." Why don't some of the other panelists answer in my 5 minutes.

Mr. TAYLOR. No, Mr. Sensenbrenner, I will address your question.

Mr. SENSENBRENNER. The Frank rule applies to Democrats and liberals——

Mr. FRANK. You didn't hit the table hard enough.

Mr. TAYLOR. I will answer your question in this fashion. Dealing with discrimination and segregation and the denial of adequate resources in the public schools or in the private schools is a major task that we all face, and if the country faced up to that task, then to answer the question that the chairman asked a while ago, we would be closer to the day when we would not need race-conscious or gender-conscious action. Even with continuing discrimination, the fact is that we have closed the gap—I am not sure you were here when I testified.

My initial testimony was that we have closed half of the gap between black children and white children. I do not think we ought to abandon the policies that are leading to closing the gap. Is that responsive to your question?

Mr. SENSENBRENNER. No, it isn't. If this were the O.J. Simpson trial, your response would be stricken as nonresponsive to the question that was asked. The question that was asked is, is the choice system of success preferable to race-based affirmative action. And I see that my time has expired.

Mr. TAYLOR. The answer is no.

Dr. BERRY. I have an answer to your question. I agree with you. I am in favor of choice schools and I think they are wonderful as long as everybody has a choice. And my problem with them is too few people do, and even in Milwaukee, they only apply to a few kids. That is my only problem with it. Yes, it is better than——

Mr. SENSENBRENNER. Governor Thompson is trying to expand the choice program and the teachers union lobby is vigorously opposing it.

I yield back the balance of my time.

Mr. CANADY. Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I ask unanimous consent to include an opening statement that would have been made had I been here.

Mr. CANADY. Without objection.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MICHIGAN

As we begin this inquiry into the role of affirmative action in opening up the doors of opportunity to minorities and women in America, we should be careful to insist that those making the case against this policy support their arguments by hard facts and careful analysis rather than sloppy thinking and casual anecdotes.

Unfortunately, affirmative action has become the scapegoat for the anxieties of the white middle class, some of which are real and some of which are fantasy.

What is real is that many Americans of all races are troubled by the absence of well-paid, secure jobs, which have been harder and harder to find. The unemployment rate was 4.5% in the 1950's and 1960's, rose to 6.2% in the 1970's, and climbed to 7.3% in the 1980's. In the 1990's the jobless rate fell to 6% but pay is less.

But what is also true is that minorities and women are not crowding white men out of the workforce. By any measure, white men straddle the workplace like a colossus. In construction, white men are 85% of the supervisors, the same rate as in 1980; in the media, they hold 90% of the top jobs; in law firms, 86% of the partnerships; in college, 85% of the tenured professorships; in the private sector, 95% of the better-paying jobs. The weekly earnings of white men were 33% higher than any other group in 1992.

The well-documented conclusion of the Federal Glass Ceiling Commission is that white males have insulated themselves within a culture that is closed to everyone else. To be blunt about it, women and minorities are excluded by the prejudices and entrenched stereotypes of white males that persist despite three decades of civil rights laws. Affirmative action's supporters do not need to invoke the sins of slavery or the historic past but can point to current, present-day discrimination and lack of opportunity that is amply demonstrated in study after study.

Affirmative action's opponents demonize the issue by claiming that women and minorities are benefitting from rigid quotas or, as the title of today's hearing says, "group preferences," but the truth is far different.

As Ted Shaw, counsel to the NAACP Legal Defense Fund has said, "Affirmative action is not a single rigid concept, but rather a mosaic of actions designed to include, to eliminate artificial barriers, and to allow merit to shine through." Yet, there are those who would ignore these facts and focus of myths, distortions and fantasies to make the case that affirmative action should be ended.

Let me respond to one of the most prevalent myths: the myth of reverse discrimination. This is the myth behind the so-called "angry white man" who has been on the cover of many-a news magazine and who supposedly will flee the Democratic Party and help the Republicans regain the White House in 1996.

The truth is only 1% to 3% of 3000 cases in a March 1995 study by a Rutgers Law Professor involved complaints of reverse discrimination, and the white plaintiffs won or the affirmative action programs were modified in only 18 of these cases (about one-half of one percent).

America's dirty little secret is that most of the white employees who claim reverse discrimination are fired or denied jobs for legitimate reasons but find it easy to blame blacks or women for their circumstance.

Yet, the myth lives on. As Michael Kinsley wrote in a perceptive New Yorker article, "the actual role of affirmative action in denying opportunities to white people is small compared to its role in the public imagination..."

What is clear to me is that affirmative action as it has been practiced in the last several decades has been effective in opening the

doors to opportunity in our society. Professor Blumrosen's study found that "five million minorities and six million women are in higher paying jobs than they would be if we distributed jobs the way we did in the 60s."

The point is that the critics who are dominating the debate are focusing on extreme and isolated cases. It is worth remembering that even in a climate that has been poisoned by misinformation, the polls show that 55% of the American people want affirmative action to be continued "as long as there are no rigid quotas."

That is a solid foundation which can be the basis of much higher public support. I look forward to working with the Chairman to follow up on these hearings with additional sessions on the support for affirmative action in the corporate sector as well as how well it has worked in the military for the past fifty years.

Mr. CONYERS. I begin by observing that the title of this hearing may be a little bit misleading: Group preferences and the law. I suppose that it is something different, because we keep talking about affirmative action here in the dialog.

And I think group preferences give some misreading to what it is we are getting at, and affirmative action programs are so varied and wide based, it would almost be preferable that we have hearings on each part of affirmative action.

The second thing I would observe is the tragedy of the context in which these hearings have to be held. Here we are, talking about one of the most important avenues by which we have begun to reduce discrimination in public and private, in the public and private sector, and here we have reduced ourselves to the best method known in our system so far, is to hold hearings, but the environment in which we are holding this hearing doesn't seem to me to be conducive to what it is we are trying to get at.

It is true that we come here with pretty fixed emotions. But I would like to merely ask of Mary Frances Berry, doctor and Chair of the Commission on Civil Rights, if there might be a better way, a way that we can get to what has been alluded to here already, to an understanding of this subject, because there are a lot of people that really don't know the facts of this matter, and would really long to have a dispositive discussion about it.

And I am afraid that it may or may not happen at a hearing, and other hearings like this that are going on on the Hill. And what I would like to do is continue to be a part of a Congress that has moved this country so far from where it was before the civil rights laws and the voters rights laws and the antidiscrimination measures, of which there is a slow but continuing stream.

It seems to me, Dr. Berry, we have now reached that point in our history, where there is a renewed vigor to turn these back, to somehow dump them, without the benefit of the kind of hearing that I think would put this subject matter in its best light.

I would like you to respond to that in any way you choose.

Dr. BERRY. Well, that is a very tough question. I will answer it specifically and then generally.

Specifically, we on the Civil Rights Commission are going to hold 3 days of hearings in May, 3 days, and we have five members who are Republican appointees out of the eight. So it is bipartisan on the subject of affirmative action, and we will look at all of the different issues, and we will have public witnesses who will come in and say whatever they want to say about the subject. So that is one way to deal with that.

But I think we need a broader conversation. The country needs a broader conversation. The country needs a conversation about the macroeconomic changes that have taken place in this society which have resulted in people being worried about layoffs and jobs and displacement, being worried because more women have entered the work force and are competing for jobs, being worried about who is going to get what and is there enough pie for everybody.

That is really what the history of this country shows, and its history in terms of civil rights leadership is that you can make the greatest progress when you have the economy on the upswing and

people are feeling positive about their own prospects and you don't have all this anxiety, and they are not looking for scapegoats.

And so we need a great conversation that somebody—it takes political courage to do it—could lead, where we could talk about those issues and what is ailing us rather than blaming each other for the process.

Mr. CONYERS. Exactly right.

Finally, I have noticed that Bill Taylor has raised the question, is affirmative action still needed, and are there people being—is affirmative action unfair to others. And I would just like you to squeeze in a comment on that, if you can.

Mr. TAYLOR. I have been at this, as you know, Mr. Conyers, for 40 years since I went to work for Thurgood Marshall. I would like to believe—I would have thought, and I think many who worked in those days thought that we would be at the point right now where we would have achieved more, and we would be closer to Dr. King's ideal of a society where decisions were based on the content of one's character rather than on the color of one's skin.

But it is an unfortunate fact of life, that you can pick up something like the Urban Institute study, and find that people who were equally matched and similarly qualified, similarly dressed, young white males, young black males, young Hispanic-American males or females who go out to find jobs and receive the most different kinds of treatment.

And that is just a fact of life in this country, in 1995, despite all the progress that we have made, and we have made considerable progress. I would just add one thing, going back to build on Mary Berry's comment.

I really do think that is right on the mark. I think we need a broader conversation in this country, and it should be a conversation about our economy, what has caused the difficulties in our economy, and it should be a conversation about how we can live together.

And I would presume to say to all of you Members of Congress that it would be in the interests of all of us, Republican or Democrat, because there is so much doubt about whether elected politicians can govern, that if we had that broader spirit of inquiry as to what the problems are, I think we might come out with something positive that would serve the needs of both parties.

Mr. CONYERS. Well, I am hopeful that your remarks will guide us as we try to struggle out of this political box we have been put in. Group preferences and the law, it seems to me that if you look at this from a historical context, we have a much larger job to do than merely point out if there are weaknesses in some portion of this wide panorama of affirmative action. I am for remedying them or qualifying them.

But the attitude I have received from the Congress and other committees that have held these hearings is that we are out—now is the time to get rid of this antidiscriminatory set of measures. Once and for all, we can excise them. And we will thinking we are going to set this country back a good deal if we go too far down this trail.

I thank the chairman for allowing me as much time as he has, and I yield back the balance.

Mr. CANADY. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

We have heard a lot about history today, and I realize that much of our civil rights legislation began with President Johnson and his setting of goals when it came to affirmative action followed by President Nixon as well. But it strikes me that we are here today because the Clinton administration has overreached, it has gone too far in imposing quotas on the American people.

I think what the administration is doing in so many of its government programs quite frankly is offensive to the vast majority of Americans who believe that individuals should be judged on basis of individual merit, not judged exclusively on the basis of color.

It seems to me that a better approach we might consider taking is if you are going to have affirmative action at all, it ought to be on the basis of need and socioeconomic disadvantage, not exclusively on the basis of that one factor, color.

I know that the President is in the midst of trying to change his mind on this particular issue, but he can't change his record. "If ye are known by your fruits." I think this administration has planted a very large lemon tree. And some of the lemons that unfortunately we see sprouting are such lemons as the following:

The U.S. Forest Service, posting a job specification that says, quote, "only unqualified applicants will be considered." A Defense Department memo that says, quote, "in the future special permission will be required for the promotion of all white men without disabilities."

Air traffic commitment to fill one out of every two vacancies with a diversity selection. Set-asides without regard to a competitive basis. Fifty percent quotas for the thousand new licenses from the FCC. The Chevy Chase Savings—this is the case of the Chevy Chase bank that was forced because of a lawsuit by this administration's Justice Department to approve loans to individuals at below-market rates even though there was no hint of any discrimination on their part whatsoever. Of course, the Clinton health care plan which also had quotas whereby certain individuals would get specific opportunities.

I think this is a tragedy, and I happen to believe that the individuals who are supposedly benefited are not necessarily going to be benefited by this kind of a system. And I would like to go to a couple of the panelists and ask questions, again, going along the familiar theme that I believe we have simply gone too far, we have overreached, and we have offended the sense of fairness of the vast majority of the American people.

In the case of California, I know that we have the civil rights initiative. Mr. Custred, I would like to ask you if you believe this is true.

A couple of years ago, the California Legislature—this is just incredible to me—actually mandated that the State university system had to admit individuals in direct proportion to their percentage of the population in California, and what is more, that the State university system actually had to award diplomas in the exact same proportion. By anybody's standard I think today those are quotas that may or may not serve any commonsense purpose.

But do you feel that the civil rights initiative is in part a reaction to this kind of overreaching, this kind of imposition of quotas on, in this case, the citizens of California?

Mr. CUSTRED. Yes, I do. In fact, the bill that you mentioned was passed by the legislature but vetoed by the Governor. And it is exactly this sort of thing that has stimulated so much interest in California, in this initiative.

I could also point to the fire department, the police department, places where absolutely absurd things have come down in the name of affirmative action. For example, in order to get the proper number of women up in the San Francisco Fire Department, they had to lower the standards to the point where they have some people, both men and women, who can't even reach the ladders on the truck. And this is documented.

In fact, I urge this committee to invite people from San Francisco to come with those data. It is there, it is a fact. Also, with the police department and fire department in Los Angeles. And it is this kind of unfairness, it is this flaunting the purposes of institutions, educational or public service, that I think has caused so many people to—

Mr. SMITH. Mr. Chairman, let me go on. Thank you for your answer.

Ms. Chavez, I believe you are from California?

Ms. CHAVEZ. No, I taught in California. Lived for 2 years there.

Mr. SMITH. Do you want to comment on the question as well?

Ms. CHAVEZ. I think contrary to what we have heard from the minority today, the American people, 80 percent of public opinion polls—I should say public opinion polls show that 80 percent of Americans are opposed to racial preferences, and the USA Today poll that was in last week's newspaper showed that nearly 50 percent of black Americans are opposed to racial preferences. That is why we are engaged in this discussion now, is because people are reacting to—again, notwithstanding Mr. Frank's remarks that he doesn't know how intrusive this is, I don't know when you have filled out forms at your bank to apply for a loan or apply for a job or apply for your children to go to school, but on virtually every government form today there is a box to check your race and your ethnicity and your gender. And it is that kind of government intrusion, it is that sense that the Government is terribly interested in your ancestry and terribly interested in considerations that should have nothing to do with whether or not you get hired or admitted to school or are given a loan that I think has people reacting.

Mr. SMITH. Thank you.

Dr. BERRY. Mr. Chairman, I just wanted to say that Ms. Chavez cited the USA Today poll incorrectly and I would like to ask that the poll be entered into the record. It in fact shows 55 to 34 percent of Americans support affirmative action and among African-Americans 72 percent support it and 22 percent oppose it. I would ask that the poll be entered into the record.

Mr. SMITH. I know the poll Ms. Chavez referred to, and her figures are correct, as are yours.

Ms. CHAVEZ. I used the term racial preference.

Mr. CANADY. Without objection.

[The information follows:]

SPECIAL REPORT: AFFIRMATIVE ACTION

Affirmative action: The public reaction

USA TODAY GALLUP

Americans are torn on the issue of affirmative action. There is overwhelming support for some programs and strong opposition to others, a USA TODAY/Gallup Poll shows. And in a political climate where half of blacks report encountering job discrimination, white

a third of whites say they have witnessed severe discrimination, support for affirmative action answers uncovered by the poll.

How much support for affirmative action?

Do you generally favor or oppose affirmative action programs that help minorities and women in the workplace?

	All	Blacks	Whites
Favor	69%	77%	53%
Oppose	34%	21%	36%

Do you favor or oppose the following?

Making a certain number of jobs and contracts available to minorities and women in a business that has few minority workers:

	All	Blacks	Whites
Favor	67%	85%	71%
Oppose	31%	15%	29%

Requiring a certain percentage of jobs and contracts to be awarded to businesses owned by minorities and women?

	All	Blacks	Whites
Favor	53%	71%	43%
Oppose	46%	29%	57%

Competing to make special efforts to find qualified minorities and women and then encouraging them to apply for jobs with that company?

	All	Blacks	Whites
Favor	72%	81%	63%
Oppose	24%	17%	37%

Providing job training programs for minorities and women who are not currently in the workforce?

	All	Blacks	Whites
Favor	82%	84%	80%
Oppose	17%	6%	16%

Providing special educational classes for minorities and women who have not been qualified for college?

	All	Blacks	Whites
Favor	78%	80%	77%
Oppose	22%	20%	23%

Source: USA TODAY/Gallup. Interviews were conducted with a poll of 1,200 adults conducted from March 15 to 21, 1995. Margin of error: ±3 percentage points. This is a percentage point, not a percentage.

Affirmative Action



By John Johnson, AP

"There are a lot of people who need training for a lot of jobs right now and affirmative action is the only way they can get it."

— William Boley, 38, of Cleveland



By John Johnson, AP

"Provide (affirmative action) help up between all minorities and women, not just focus on women in general or blacks in general."

— Corrie Sue Knudsen, 46, of Washington, D.C.

Is affirmative action needed?

Do you think schools and businesses should or should not provide opportunities if the government dropped all affirmative action programs?

	All	Blacks	Whites
Would	49%	27%	48%
Would not	48%	77%	43%

How much of a problem do you think job discrimination is for the following groups?

	White men	White women	Black men	Black women
Major problem	19%	15%	38%	40%
Minor problem	38%	31%	30%	28%
Not a problem	41%	54%	32%	32%

How have lives been affected?

Have any of the following things ever happened to you as a result of affirmative action programs favoring minorities?

	All whites	White men	White women
Not offered a job that went to a minority person	12%	15%	10%
Passed over for a promotion that went to a minority person	8%	8%	8%
Not admitted to a school	2%	4%	1%

Have any of the following things ever happened to you as a result of affirmative action programs that favor women?

	All men	Black men	Black women
Not offered a job that went to a woman	8%	7%	10%
Passed over for a promotion that went to a woman	2%	2%	2%
Not admitted to a school	2%	2%	6%

Do you believe that any of the following things have ever happened to you because of affirmative action programs?

	All blacks	Black men	Black women
Not offered a job that went to a white person	32%	42%	31%
Passed over for a promotion that went to a white person	31%	42%	28%
Not admitted to a school	6%	7%	5%

Do you believe that any of the following things have ever happened to you because of discrimination against women?

	All women	White women	Black women
Not offered a job that went to a woman	19%	20%	18%
Passed over for a promotion that went to a woman	12%	13%	13%
Not admitted to a school	2%	1%	5%

Have you personally ever thought that a woman who worked got a promotion as a result of affirmative action?

	White	Black
Yes	19%	20%
No	80%	79%

Have you ever thought that a woman who worked got a promotion as a result of affirmative action?

	White	Black
Yes	21%	20%
No	79%	80%

Have you ever thought that a woman who worked got a promotion as a result of affirmative action?

	White	Black
Yes	21%	20%
No	79%	80%

Source: USA TODAY/Gallup. Interviews were conducted with a poll of 1,200 adults conducted from March 15 to 21, 1995. Margin of error: ±3 percentage points. This is a percentage point, not a percentage.

Mr. FRANK. Would the gentlewoman yield 30 seconds?

Mr. CUSTRED. Mr. Chairman, may I be excused? I have an appointment.

Mr. CANADY. I understand Mr. Custred has another appointment and must leave. I also understood you will be willing to answer written questions from Members who have not had an opportunity to ask questions of you.

Mr. FRANK. I want to respond to Ms. Chavez's misstatement of my point. She said I said it was not intrusive. I was responding to a comment that there was a massive structure of preferences that had been erected. I do not think checking off a box on a form when you apply for a mortgage as I have done is a massive structure of preference. So I would just like to be accurate about that. She has refuted a comment I never made, quite successfully.

I would also like to say, I have to say with regard to my friend from Texas, the political purpose of at least part of this hearing was just made very clear, that distorted recitation of things about the Clinton administration is a pretty blatant example of the kind of partisanship that is involved here, and that is why so many of us have a hard time taking totally seriously some of the professions that motivate this.

In fact, the differences between—

Mrs. SCHROEDER. Could I reclaim my time? Mr. Chairman, I am having my—

Mr. FRANK. I would ask unanimous consent the gentlewoman get an additional minute to compensate.

Mr. SMITH. I will be brief, Mr. Chairman. My point is in giving those examples, and Mr. Frank is correct, in that if I used the administration's name, perhaps that was being partisan, but nevertheless all those examples I gave were accurate representations of the change of policy by this administration.

My point in referencing those examples is to make the point that the administration has changed policies in the past and it has done so in a way that I guess is opposed by what 75 or 80 percent of the American people—I do not make up the examples. Those are real life—

Mr. CANADY. The gentlelady from Colorado can proceed.

Mrs. SCHROEDER. Mr. Chairman, I was thinking I was going to have to ask for a special preference here. Thank you.

Let me say that this has gotten so tense, and I really don't like that tone, because I remember this being something that there was a strong bipartisan consensus. There is no one in the panel that would repeal the 1964 Civil Rights Act, right? I mean, is there anybody that would do that? So can we get a bipartisan panel consensus that that should remain?

Mr. GRAHAM. Right.

Mrs. SCHROEDER. If we move beyond that, is there anyone on the panel that thinks all public tests meet the *Griggs v. Duke Power* decision? Because I have never seen one yet that met it.

In other words, that the standards we are applying in the private sector to their test, does anybody think that the tests we apply in the public sector will meet that test?

Ms. CHAVEZ. Yes, I do.

Mrs. SCHROEDER. And no one else does.

Ms. CHAVEZ. If they don't, we have adequate remedies to address that through the courts.

Mrs. SCHROEDER. Well, I know as one who came out of this field of law, I spent an awful lot of time looking at the Federal Government's tests and found they discriminated. They were interesting in how they discriminated against all sorts of people, including the Foreign Service which we found discriminated against Southern males, all white males except—they discriminated against everybody except people who went to four universities on the east coast. And they asked questions like who won the Cannes Film Festival in 1955, which is clearly something every Foreign Service officer should know.

So I think one of the issues here is you have got the issues relating to the job and everybody should meet that criteria relating to the job if it is something you must have, if it is a job-based criteria. I don't think there is anyone on the panel who would say, oh, for certain groups, fudge it. But part of the issue becomes there is a lot of testing that goes on that appears to be more a due power thing.

But let me go to another part that I also thought was sort of bipartisan that I think was being missed. The glass ceiling thing that just came out. My understanding is that Elizabeth Dole started this. It was then carried on by Lynn Martin. It has now been released and it still says, guess what? There are still very serious problems for American women. And this would be one of the preferences that people are talking about as it floats around today.

Does anyone on the panel disagree with the current glass ceiling report?

Ms. CHAVEZ. Yes, I do.

Mrs. SCHROEDER. Do you, Ms. Berry?

Dr. BERRY. Is she going to comment or just say yes or no?

Mrs. SCHROEDER. Sure. Why do you think that both Republican women, Elizabeth Dole, Lynn Martin, and others who came forward with this are wrong?

Ms. CHAVEZ. Well, as I mentioned in my own testimony, Richard Nixon in my view is the father of quotas. During the Reagan and the Bush administrations, we had race norming at the Department of Labor. There were no clean hands.

Mrs. SCHROEDER. We are talking about the glass ceiling.

Ms. CHAVEZ. In terms of the glass ceiling report, I don't think it was a very well-done study. Most of the economists and other so-called experts on whose testimony the study was based represented advocacy organizations. This was not a—I don't believe it was a very well-constructed—

Mrs. SCHROEDER. Women are doing well and they—

Ms. CHAVEZ. I don't think that study is a very good example. There have been—you may be aware when I was staff director of the U.S. Commission on Civil Rights, we did a study on the comparable worth issue and in fact we had some very good information in that study.

Mrs. SCHROEDER. I remember Commissioner Thomas saying comparable worth was a Looney Toons idea.

Dr. Berry.

Dr. BERRY. All I want to say is it was Clarence Pendleton, God bless his soul—never speak ill of the dead—not Mr. Thomas, who said that.

Mrs. SCHROEDER. That is right. Mr. Thomas lauded it.

Dr. BERRY. Anyway, I just wanted to say there are other studies in addition to the glass ceiling report which document the same inequities the glass ceiling report found and that the study that Ms. Chavez referred to tried to show women were in jobs making less money because of their family responsibilities, which is great if you have got somebody to support you and you can stay at home. But unfortunately, as we know, most women are not in that position. It has nothing to do with race, just women, whatever race we are. And women do want jobs where they make some money.

And I thought that 97 percent figure was kind of interesting. I tell my students all the time that public policies are not based on facts. They are based on perceptions and based on who gets the spin, which is why we are talking about preferences and all that, rather than talking about something else and quotas. But anyway, the glass ceiling report—

Mrs. SCHROEDER. Those are all snarl words.

Dr. BERRY. Yes.

Mrs. SCHROEDER. When I was listening to all this, I was beginning to think I awakened and I was in Bosnia.

Mr. TAYLOR. I just want to say, Mrs. Schroeder, on the question of Federal tests for Federal employment, I recently had the privilege of joining a group called the Board of Testing and Assessment which is an arm of the National Academy of Sciences and which consists of physical and social scientists around the country and a lawyer.

We continue to struggle with how to get those tests fair as you well know. Anybody who can say those tests are fair and accurate and measure what we want them to measure right now has not really looked at the complexity of trying to do that job. So that is an ongoing battle.

Mrs. SCHROEDER. I am sure every one of us could create a test that the rest of us couldn't pass because we all come from specific things that we know about. I used to bet my male friends and they would say no, you can't, and I would ask them what a gusset was, and that was the end of that argument. But that is not the issue. The issue is, does it relate to the job is what you are saying.

Mr. TAYLOR. Right.

Mrs. SCHROEDER. But I think that is the same with the SAT's.

Mr. TAYLOR. Right.

Mrs. SCHROEDER. We know the SAT's have not traditionally tracked 100 percent who is going to be successful and who isn't. So hanging everything on a test when the test has not been proven to be dispositive of how the person is going to perform in the job makes it very, very difficult in this issue.

I think the other part is we collect taxes from all these groups equally. And if you are going to have programs or universities or things that they never get into, women never get into or whatever, maybe we should lower that group's taxes because they are contributing to a university they are not allowed to participate.

I remember having a hearing—the gentleman from Virginia is sitting next to me—when the University of Virginia was not letting women in unless they had 100 percent higher points on the SAT's and they had to have a whole grade point higher.

I remember the president of the university testifying, if they were made to have more women, they would have to put in more kitchens because women ate more often. They would have to put in more diminutive furniture and that they had found the grades remained higher if there were fewer women because the stag lines were longer on Saturday night.

And I think that is kind of the stuff that circulates around and around this, and I am kind of glad that we have got some of those things now and women can now get in equally. Thank you, Mr. Chairman.

Mr. CANADY. Thank you.

Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Ms. Berry, I was interested in one thing you said and Ms. Chavez alluded to it as well regarding the EEOC. You called it a swamp. In fact, you did that a couple of times. And I must say that in my 18 years of experience with that agency, I have always found it pretty much to be a swamp.

During the time that I practiced law and represented plaintiffs in civil rights cases, job discrimination cases, I found it to delay your ability to bring a matter in court. In fact, I on more than one occasion wound up litigating extraneous matters based upon inappropriate actions taken by the agency, refusing to issue right-to-sue letters and so on.

What is the solution to that? Should we just do away with the EEOC and let people go right to court?

Dr. BERRY. Well, if you let them go right to court, then we have got a problem of lawyers, resources, Justice Department, who is going to finance it—especially if you pass these laws up here saying that the loser has to pay for the litigation. Most of these people who want to sue don't have any money to pay.

Mr. GOODLATTE. But they are not getting any relief from the EEOC. When they go to court, I can tell you that in the cases my law firm handled, they got relief.

Dr. BERRY. Well, you might be able to if you were going to get rid of the EEOC. You would have to provide some kind of fund, or figure out some way for folks who couldn't figure out how to do it to gain relief, or for Justice or somebody to intervene. The other option, of course, is to try to fix it. I don't know how you do it. It needs more money, that is true, but it needs more efficiency along with money.

And so I just think that the fact that we have let it sort of drag along like that all these years means, to me, it is a symbol of our lack of seriousness about having the Government really do anything on the employment side. And you need private lawyers, as you know, private lawyers in the litigation process. These legal defense funds have made a much greater impact on what has been going on in employment discrimination law than the EEOC. They are sort of the laggards in this.

Mr. GOODLATTE. Ms. Chavez, do you want to comment on that?

Ms. CHAVEZ. I am reluctant to make a definitive statement. I think that it is clear that EEOC, the whole bureaucracy of the EEOC impedes quick resolution of complaints, and with the way it operates under both Democrat and Republican administrations, they have not had a particularly good record.

I don't know that I would be quite at this point for saying definitively that we ought to dismantle it, but perhaps there ought to be at least the alternative that rather than—

Mr. GOODLATTE. Bypassing it?

Ms. CHAVEZ. Right, insisting—allowing individuals to choose to bypass it if they wanted to.

Mr. TAYLOR. If I could add a word.

Mr. GOODLATTE. Very quickly because I have very little time.

Mr. TAYLOR. EEOC needs many things, but one of the things it needs is an effective alternative dispute resolution system. I think if you were able to construct that, bring in people whose job it was to settle cases, you could make an impact on that caseload and good management can help do the rest of the job.

Mr. GOODLATTE. You may be right about that. I think I would prefer to see that as an adjunct of the court system rather than as an adjunct of an agency that, frankly, hasn't done well and hasn't shown the tendency to do the job it was intended to do.

Turning to the issue more relevantly at hand, I have to take exception to this statement from the gentleman from Massachusetts that the Federal Government is not heavily involved in this issue of affirmative action.

Mr. FRANK. Will the gentleman yield? I don't know why it is so hard for you all to get it straight. I said I was objecting to the phrase "a massive structure of preference."

Mr. GOODLATTE. OK.

Mr. FRANK. If you can't distinguish between that and heavily involved, we have a language problem.

Mr. GOODLATTE. Taking back my time, the 31 pages of Federal statutes and regulations and executive orders, more than 170 of them listed in here, is to me a massive structure of preference. And if I might direct my questions to the—

Mr. WATT. Can I ask the gentleman what he is reading from?

Mr. GOODLATTE. I am reading from the Congressional Research Service memo prepared at the request of Senator Dole listing a compilation, overview of Federal laws and regulations establishing affirmative action preferences establishing ethnicity—

Mr. FRANK. This year Senator Dole, not 10 years ago Senator Dole.

Mr. WATT. That is the one that Senator Dole said that there wasn't any preference.

Mr. CANADY. The gentleman's time.

Mr. GOODLATTE. If I might ask that very question. Ms. Berry, do you ascribe to all of these regulations that are in here—let me give you an example. Here is one that deals with Federal acquisitions regulations that says individuals who certify that they are members of named groups, black Americans, Hispanic-Americans, Native-Americans, Asian Pacific-Americans, subcontinent Asian-Americans are to be considered socially and economically disadvantaged for purposes of socioeconomic programs under the Federal acquisi-

tions regulation, which is a regulation dealing with purchasing by the Federal Government from various sources.

Do you think that it is appropriate to designate somebody as economically disadvantaged solely based upon ethnicity or race?

Dr. BERRY. Well, that is interesting. You picked out the Nixon administration one. Nixon put that in there. Based on looking at the history of these groups, they thought that there could be a rebuttable presumption, which you understand as a lawyer.

Mr. GOODLATTE. That is not a rebuttable presumption. That is an absolute presumption of disadvantage.

Dr. BERRY. There are other provisions here where you can rebut it. They said that, based on the history of these groups, they were the ones. Now, at the time I had nothing to do with it. I don't know if I would pick these. If I wanted to be insular, I would have just picked black folks or something. But they did it.

Mr. GOODLATTE. Going back to Mr. Smith's point that if we were going to have preferences of that type, Why not make them simply based upon economic conditions rather than adding in race as a factor?

Dr. BERRY. I don't have any problem with targeting by economic disadvantage. My problem is, for some purposes, you have to target to remedy race discrimination and sex discrimination because they are different things.

Mr. GOODLATTE. But some of these statutes and regulations could be changed.

Dr. BERRY. Well, I don't know. I haven't read all of them.

Mr. GOODLATTE. I just pointed out one to you that you targeted as a Nixon administration faux pas. But the point is well taken, that these hearings might very well be justified if we go through and find some more that serve these purposes that may not be justified even under the intent that you have expressed.

Let me give you another example. Here is one that says the Secretary of Agriculture is authorized to set aside a portion of funds appropriated for certain research on the production and marketing of alcohols and industrial hydrocarbons for grants to colleges and universities to achieve the objective of full participation in minority groups.

Is that a quota?

Dr. BERRY. No.

Mr. GOODLATTE. It doesn't set a specific amount.

Dr. BERRY. No.

Mr. GOODLATTE. It is not a quota?

Dr. BERRY. No.

Mr. GOODLATTE. Now, once——

Dr. BERRY. It doesn't say a specific amount and does not say how many minority students.

Mr. GOODLATTE. OK, but let me ask you this. Once somebody follows the prescription of this code section and does set an amount as they are required to do by this law, is that a quota?

Dr. BERRY. No. Because they don't have to set aside a specific amount. They can change it if they want to.

Mr. GOODLATTE. They have to set aside an amount. Once they set aside that amount, though, then they have to award that portion that they have chosen to set aside based on that.

Dr. BERRY. No, they don't. No, they don't. If they don't, they don't exhaust it. There is no requirement that you can't go to the next step if you don't exhaust the amount of money you set aside. It doesn't say that.

Mr. GOODLATTE. It says you have to set aside a certain amount. It doesn't say what the amount is.

Dr. BERRY. It says a portion of funds. It doesn't say that portion of funds must be used to achieve the objective of full participation of minority groups otherwise—.

Mr. GOODLATTE. Let me ask you, there are a number of them in here that say must set aside up to a particular percentage.

Dr. BERRY. Where?

Mr. GOODLATTE. Well—

Dr. BERRY. I mean, for example—

Mr. GOODLATTE. Let me find one here.

Dr. BERRY. I don't like to answer questions if I don't know what I am answering.

Mr. CONYERS. Will the gentleman yield?

Mr. GOODLATTE. Just for a second. This is the Department of Education.

Dr. BERRY. Let's do page 9. What page are you on?

Mr. GOODLATTE. I am on page 13, 20 United States Code, section 1069 F(C), "reservation of 25 percent of the excess of certain educational appropriations for allocation" among eligible institutions, at which at least 60 percent of the students are African-Americans, Hispanic-Americans, Native Americans, Asian-Americans, Native Hawaiians, or Pacific Islanders or any combination thereof.

Is that a quota?

Dr. BERRY. Yes.

Mr. GOODLATTE. Is that a quota?

Dr. BERRY. It is—the 5-percent excess.

Mr. GOODLATTE. You see, I don't mean to be belligerent about this.

Dr. BERRY. I don't know.

Mr. GOODLATTE. I agree with you that the concept of affirmative action when it is simply an institution, public or private to ensure that various people of various backgrounds are represented in programs is a worthy goal. But when we go beyond that and set percentage amounts that have to be reserved or set aside for that purpose, I think these laws should be reviewed and I think they should be made more fair because the effect is very often to discriminate against people on the basis, not of their race or ethnicity, but on the basis of their economic background.

Dr. BERRY. Mr. Goodlatte, I would agree with you. I think the reason I would agree with part of what you said is the reason why you have this whole list here: All of the programs that are listed here would have or do have preferences for whites if you don't do something for people who have been left out in the absence of any kind of rule, regulation, or anything else.

I told you, and the history is documented, all Federal grants, highway construction, colleges, universities went to whites, all of them. There wasn't any preference. There wasn't anything that says 125 pages of preferences for whites or for men, but without any kind of indication at all because of the discrimination that

went on, people couldn't get a contract, they couldn't get whatever. So these requirements that are the terms are remedies to the discrimination of what took place.

Mr. GOODLATTE. I wouldn't disagree with you, there has been past discrimination.

Dr. BERRY. Here and now.

Mr. GOODLATTE. Nor would I disagree—

Dr. BERRY. Here and now.

Mr. GOODLATTE [continuing]. That there isn't discrimination that occurs now. Let me say, when you set up a form of discrimination based on a quota, the effect does not reach back to those people who may have been responsible for perpetrating the original discrimination. It may very well be hitting somebody from a poor white economic background that has not participated in any type of discrimination.

Mr. CANADY. I am sorry, the gentleman's time has expired. We are going to have to go to our second panel. I want to thank each of the members of this panel for being with us. We appreciate your time and I would like to ask that the members of the second panel please take their seats.

Mr. FRANK. Mr. Chairman, while they take their seats—

Mr. WATT. You are not going to let our visitor answer the question, Mr. Scott?

Mr. CANADY. I am sorry, as Mr. Scott understood, as I explained at the beginning of the hearing, if he wished to ask questions, he would need to be yielded time from a member of the committee.

Mr. FRANK. I will yield time from the next panel.

While the panel is taking a seat, I would like to recognize Mr. Goodlatte is misrepresenting—

Mr. CANADY. I am sorry, Mr. Frank, we are going to have to go to the second panel.

Mr. FRANK. While they are coming up, we can talk.

Mr. CANADY. You will have an opportunity to ask questions.

Mr. FRANK. The misrepresentation is so blatant.

Mr. CANADY. Mr. Frank.

Mr. FRANK. They can leave. They can be walking up here.

Mr. CANADY. Members of the second panel, please take your seats and then we will hear your statements and then you will be recognized.

Mr. FRANK. While they are coming up, I would like—

Mr. CANADY. I don't want it going back and forth because then it will be Mr. Goodlatte who will want to respond to you. We will stay within the framework.

Mr. FRANK. I would just like to read the document he so blatantly misrepresented.

Mr. CANADY. I would like to thank the members of the second panel for waiting patiently. We appreciate your taking the time to be with us today. I will introduce the members of the panel in the order in which they will give their testimony.

First, Anne Bryant—excuse me. We are proceeding with the second panel. Those of you who wish to have a conversation, please remove yourselves to the hall.

Anne Bryant is president of the American Association of University Women. Thank you for being here.

Laura Ingraham is a member of the Independent Women's Forum and an attorney practicing white-collar criminal defense in Washington. She is a former law clerk for Supreme Court Justice Clarence Thomas and domestic policy assistant in the Reagan administration.

Nancy Archuleta is chairman and CEO of MEVATEC Corp., a science and engineering company that provides high-tech goods and services to the Federal Government and commercial enterprises.

Joseph Broadus is a professor of law at George Mason School of Law. He is also a special assistant to the Honorable Carl Anderson, U.S. Commission on Civil Rights.

Thank each of you for being here. Ms. Bryant.

**STATEMENT OF ANNE L. BRYANT, EXECUTIVE DIRECTOR,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN**

Ms. BRYANT. Thank you very much, Mr. Chairman, and I will present a shorter report, so I would like the written testimony to be submitted into the record.

Mr. CANADY. Without objection, your statement and those of all the other witnesses will be admitted in the record in their entirety.

Ms. BRYANT. I am proud to represent the 150,000 members of the American Association of University Women through our 1,700 local chapters or branches and also representing the over 850 college and university members.

For over 100 years, AAUW's mission has been to promote education and equity for women and we are founded on the belief that all individuals have the right to an equal intellectual, social, and economic opportunity. Unfortunately, that equality does not yet exist throughout society.

With a long history of commitment to ending discrimination against women and minorities, AAUW has supported affirmative action policies as one means of removing barriers which inhibit these groups from full participation in education and employment. At the very time when we are beginning to see the positive effects of affirmative action, we must not retreat on the commitment to equality of opportunity. There is simply too much at stake in our Nation.

Through AAUW's research on the status of girls in education, we discovered that this glass ceiling begins construction in kindergarten and we know that it continues on up through the workplace and into corporate board rooms.

Our report, "How Schools Shortchange Girls," published in 1992 revealed that girls and boys are not treated exactly the same in our schools. Girls shy away from advanced level math and science courses, perhaps opting for better grades. The result—girls are tracked away from better paying jobs in science and technology. So it shouldn't surprise us today that women are only 31 percent of scientists, 16 percent of physicists and 8 percent—8 percent of engineers.

Now, all of that is not to say that we are not making progress. We are making great progress and it is thanks to affirmative action policies which have successfully begun to establish equal opportunity for women and minorities. Since affirmative action policies

have been implemented, the numbers of women in many professions have increased.

For example, between 1972 and 1993, the percentage of women lawyers and judges jumped from 4 percent to 23 percent. In approximately that same time period, women physicians went from 7.6 percent in the early 1970's to 16.9 percent in 1990. But these numbers and percentages tell only part of the story.

Two weeks ago, we saw the results of the Department of Labor report on the glass ceiling that was mentioned earlier that white men are 43 percent of the Fortune 2000 work force but hold 95 percent of all senior management positions. The number used earlier was 97 percent. That is because Dr. Berry was referring to the Fortune 1000 top companies.

This is 1995. We know that affirmative action policies are still needed. It is clear from this data we are not ready to, quote, "move on." The fact that women still earn just over 70 cents on the dollar is another indication that discrimination in the workplace still exists. Much of this wage gap is due to the fact that women are still segregated into traditionally female-dominated jobs where the wages are lower. So the data is clear, affirmative action policies are still needed.

Then who is opposed to its continuation? Current Federal standards for affirmative action including goals and timetables were recommended to President Nixon by 350 large corporations. They have enjoyed bipartisan support. President Kennedy and six successive Presidents, the Business Roundtable, the National Association of Manufacturers have repeatedly endorsed affirmative action.

Contrary to what the press wants us to believe, most polls reveal approximately 55 percent of Americans support affirmative action policies. It is only when the word "preference" is inserted into the survey question that you see the more negative response that Ms. Chavez responded—was talking about earlier.

Americans do not want quotas. They do not want unfair preferences. They do want job recipients to be qualified for the positions they receive which in fact is the current state of the law.

Goals and timetables are not quotas. Federal policy on affirmative action specifically states that failure to meet goals and timetables does not subject one to sanctions as long as there are good-faith efforts to meet them. Further, affirmative action must involve only qualified workers.

We must be careful to separate today's rhetoric from the legal affirmative action standards that have worked for decades. Affirmative action programs have convinced many Americans that women and minorities can truly help our Nation to better compete—compete globally by their inclusion and contribution to all areas of work, research, and education.

When affirmative action policies began, there were no women astronauts. There were no women on the U.S. Supreme Court, and very few women in higher State courts. Affirmative action policies have helped many parents, teachers, executives, recruiters, and the gatekeepers of the workplace to recognize that it is crucial to utilize the collective brain power of all Americans.

The expansion of women and minorities into all fields has benefited society by increasing the breadth of those professions. For ex-

ample, the advancement of women in medical science has contributed to increased attention to women's health issues, such as breast cancer and osteoporosis. The increase in the number of women and minority physicians has created a more diverse pool from which patients can choose.

Increased recruitment and training of women police officers as mentioned before, prosecutors, judges, and court personnel has led to the improvement in the handling of domestic violence cases, sexual assault cases. These changes have been gradual. They have taken time. They will take more time.

The contributions of women and minorities are transforming the knowledge base of every profession and occupation. As business knows, global competition demands we use the very best brains to compete. It is no time to retreat. We must continue affirmative action policies and even improve them where improvement is called for.

Finally, what many people don't seem to realize is that virtually every family in America has benefited from affirmative action. Forty-six percent of the U.S. workers are women. At a time when most families depend on the earnings of both parents, and in some cases just the mother, it is imperative that all adults have the opportunity for maximum earning power to support themselves and their children.

Affirmative action programs for women help give wives, grandmothers, mothers, sisters, and daughters the chance to compete in the workplace and contribute to their family's security. Continuing affirmative action policies will mean that more families will be able to feed and clothe their children adequately. They will buy homes. They will send their children to college and start small businesses.

Now is not the time to retreat on affirmative action. The economic health of American families is at stake.

Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Ms. Bryant follows:]

PREPARED STATEMENT OF ANNE L. BRYANT, EXECUTIVE DIRECTOR, AMERICAN
ASSOCIATION OF UNIVERSITY WOMEN

Chairman Canady, thank you for the opportunity to testify before this committee on affirmative action. I am Anne Bryant, Executive Director of the American Association of University Women (AAUW). I am testifying on behalf of the 150,000 members and 1,700 local branches of AAUW.

For over 100 years, the American Association of University Women has promoted education and equity for women and girls. Through scholarships and grants, mentoring programs for girls, lobbying for sound and equitable education and work policies at all levels of government, and ground-breaking research on the shortchanging of girls in America's schools, AAUW has sought to break down the visible and invisible barriers to women in education.

AAUW's mission to promote educational equity for women is founded on the belief that all individuals have the right to equal intellectual, social and economic opportunity and the belief that equality does not yet exist throughout our society. With a long history of commitment to ending discrimination against women and minorities, AAUW has supported affirmative action policies as one means of removing the barriers that inhibit women and minorities from full participation in education and employment. At the very time when we are beginning to see the positive effects of affirmative action, we must not retreat on the commitment to equality of opportunity. There is simply too much at stake for all of us.

AAUW has discovered through our research on the status of girls and education that the glass ceiling is constructed in kindergarten and continues in the workplace up through the corporate boardrooms. Our report, How School Shortchange Girls, published in 1992, revealed that girls and boys are treated unequally in schools, and that boys receive more attention and positive reinforcement. In this environment where girls often learn that they will not pursue the same careers as their brothers, it is not surprising that their mothers, sisters, and grandmothers are underrepresented at all levels of society. When girls are systematically tracked away from the better paying jobs in science and technology, it is not surprising that women are only 31% of scientists, 16% of physicists and 8% of engineers.

All of that is not to say that we have not made great progress in the past 20 years; we have. Affirmative action policies have successfully begun the process of establishing equal opportunity for women and minorities. Since affirmative action policies have been implemented, the numbers of women in certain professions have increased. Between 1970 and 1990, the proportion of women physicians doubled from 7.6% to 16.9%. From 1976 to 1989 the percentage of medical degrees earned by women jumped from 19% to 33% and law degrees from 23% to 41%. Between 1972 and 1993 the percentage of women lawyers and judges jumped from 4% to 23%, and women accountants from 22% to 50%. Between 1975 and 1989 the number of women college and university presidents more than doubled from 148 to 328, about 11% of the total presidencies. The number of women-owned businesses has also risen since the implementation of affirmative action policies. Between 1982 and 1987, the number of women-owned businesses rose more than 58%, a rate of growth more than four times the rate for all

businesses.

But these numbers and percentages tell only part of the story. When we see the results of the Department of Labor report on the glass ceiling, that white men are only 43% of the Fortune 2000 work force, but hold 95% of senior management positions, we know that affirmative action policies are still needed. A related study found that women are only 6.8% of boards of directors at Fortune 500 and Service 500 companies. It is clear that we are not ready to "move on" when white men are 33% of the U.S. population, but 65% of physicians, 71% of lawyers, 80% of tenured professors, and 94% of school superintendents.

In education, women are still underrepresented in many areas not traditionally studied by women. In 1992 women received only 9% of undergraduate engineering degrees and less than 22% of doctorate degrees in mathematics and the physical sciences. Women faculty are also underrepresented in nontraditional fields. In 1990, women constituted less than 10% of the faculty teaching in each of the following disciplines: physics, agriculture and forestry, natural science, and engineering.

Even in those professions and education fields where the number of women is increasing, they are still not well represented at more senior levels. While women are earning just over half of all associate degrees, bachelor's degrees and master's degrees, they still lag behind males at the highest degree level, earning only 36% of all doctoral degrees. While women are 40% of all college professors, they are only 11% of those with tenure. Women are 50% of entry level

accountants but less than 20% of accounting firm partners. Women are now 23% of all lawyers but they only hold 10% of partnerships in law firms. Women occupy 44% of all federal jobs but only 13% of the top jobs. Between 1975 to 1987, the number of colleges and universities headed by women increased by 100%, and yet women continue to be clustered at the lower levels of college management; as of 1994 only 11% of all academic CEO's were women, compared to 20% of development officers and 25% of student affairs officers.

The fact that working women still earn just over 70 cents for every dollar men earn is another indication that discrimination against women in the work place still exists. Much of this wage gap is due to the fact that women are still segregated into traditionally female-dominated jobs where wages are low. In 1993, 61% of all employed women worked in technical/sales, service and administrative support/clerical positions, while only 28% of women worked in higher paying managerial and professional fields. With the same educational background, women earn less than their male peers. With a high school degree, women earn approximately \$8,100 less than men; with college degrees women earn \$12,240 less than men. Even within the same occupation women receive lower wages than men. In 1992, women college professors earned 75% of their male counterparts' earnings. In 1994, women physicians earned only 77% as much as male physicians. Pay inequities due to occupational segregation are even worse for people of color. To achieve pay equity, affirmative action programs are crucially needed to provide women and minorities with the professional and educational opportunities necessary to enter higher paid job categories. It is no accident that the majority of minimum wage earners are women. Too many women have been prepared for only low-wage, low-skill jobs from the

moment they entered the schoolhouse.

The current federal standards for affirmative action, including goals and timetables that were recommended in the late 1960's to President Nixon by a group of 350 large corporations, have enjoyed bipartisan support. Since that time, nine successive presidents, the Business Roundtable and the National Association of Manufacturers have repeatedly endorsed affirmative action. Contrary to what the press wants us to believe, most polls reveal approximately 55% of Americans support affirmative action policies. Only when the word "preference" is inserted into survey questions is there a more negative response. Americans want no quotas and want job recipients to be qualified for the positions they receive, which is in fact the current state of the law. Goals and timetables in affirmative action policies are not quotas. Federal policy on affirmative action specifically states that failure to meet goals and timetables does not subject one to sanctions as long as there are "good faith" efforts to meet them. Further, affirmative action, to be permissible, must involve only qualified workers; federal affirmative action policy recognizes and incorporates the principle of merit. Legally, affirmative action policies ask employers to consider sex, race, or national origin as one of many factors when reviewing qualified job applicants. We must be careful to separate the rhetoric from the legal affirmative action standards that have worked for decades.

Affirmative action programs have convinced many Americans that women and minorities truly can reshape the nation by moving into the mainstream of work, that women and minorities are as qualified as white males to move into positions of responsibility, authority and

skill. When affirmative action policies began, there were no women astronauts. There were no women on the U.S. Supreme Court, few if any women on the higher state courts. Affirmative action policies have helped many parents, teachers, executives, recruiters, and the gatekeepers of the workplace recognize that it is crucial to utilize the collective brainpower of all Americans, including women and minorities.

The expansion of women into traditionally male dominated fields has benefited society by increasing the breadth of those professions. For example, the advancement of women in medical science fields has resulted in increased attention to women's health issues such as breast cancer. The increase in the number of women physicians has created a far more diverse pool from which patients can choose. Increased recruitment and training of women police officers, prosecutors, judges and court personnel have led to an improvement in the handling of domestic violence and sexual assault cases. These changes have been gradual; they have taken time. The recent contributions of women and minorities have transformed the knowledge base of every profession and occupation. This is no time to retreat. We must continue affirmative action policies, even improve them where improvement is called for.

Finally, what many people don't seem to realize is that virtually every family in America has benefited from affirmative action. Forty-six % of United States workers are women. In a time when most families depend on the earnings of both parents, and in some cases just the mother, it is imperative that all adults have the opportunity for maximum earning power to support themselves and their children. Affirmative action programs for women help give wives,

mothers, and daughters a chance to compete in the workplace and contribute to their family's security. Continuing affirmative action policies will mean that more families will be able to feed and clothe their children adequately, buy homes, send their children to college, and start small businesses. Now is not yet the time to retreat on affirmative action. The economic health of American families is at stake.

Mr. CANADY. Ms. Ingraham.

**STATEMENT OF LAURA A. INGRAHAM, ON BEHALF OF THE
INDEPENDENT WOMEN'S FORUM**

Ms. INGRAHAM. I would like to thank the committee for holding this hearing. Before I say a few words, I would like to make a comment about something a previous panelist said because I think it demonstrates the polarizing and, really, devastating effect that, to some extent, group preferences have had.

Mary Frances Berry talked about what the landscape of the American work force would look like if there weren't such group preferences in place. And she said that if we had abandoned those group preferences, the top jobs in the United States would be dominated by Jews and Asians.

Well, gosh, as a woman who has tried to work hard and tried to succeed, I really take issue with that and I think the Independent Women's Forum would disagree with that strongly, as would a lot of Americans who are trying to succeed in this country. I think that is the kind of stereotyping that is really unhelpful and I think that is very, very devastating.

Today I do speak on behalf of the Independent Women's Forum and we commend all of you for holding these hearings to examine Federal policies, laws, and regulations that encourage group preferences, preferential group treatment, whether mandated, encouraged, or even tolerated by the Federal Government raises serious questions about a principle central to the American spirit—that is fairness.

Thirty years after President Kennedy's Executive Order 11246 in which he first espoused the concept of affirmative action, we as a nation committed to equal opportunity and equal access must ask ourselves whether we have veered off course or whether the program is working. I first began thinking about the idea of gender discrimination and gender preferences in 1980 as a high school student when I heard then-Presidential candidate Ronald Reagan—in whose administration I would later work—promise that, if elected, he would nominate the first woman to sit on the Supreme Court.

This somehow seemed wrong to me, and not because I didn't believe a woman would make a great Supreme Court justice but because I thought that people were supposed to be judged without regard to race or gender. A decade or so later as a law clerk at the Supreme Court, I grew to respect Justice O'Connor immensely because she was a committed and talented justice, not because she was the first female justice.

This coming Sunday, when women will descend on Washington to protest what the National Organization for Women calls the recent tyrannical measures against women such as the national ground swell for dismantling Federal affirmative action programs, rally organizers hope to persuade the public increasingly skeptical of group preferences that affirmative action is as crucial to the success of women in the workplace as it is for minorities.

The tone of the press release announcing this rally resonates a siege mentality where women are being targeted for discrimination by men at every turn. Yet the rally literature makes almost no

mention of the enormous gains that women have made in the workplace.

Although the Independent Women's Forum doesn't believe that the majority of women in the United States share this pessimism, we are very concerned that if the Federal Government continues its decisionmaking on the basis of gender, women will be relegated to a permanent second-class status where they are not held to the same standards as their male counterparts and, therefore, cannot compete on the merits for job, education, or promotions.

Of course we recognize, as I am sure most people do here, that affirmative action did do tremendous things for women by opening previously closed doors in employment and education. That is all true. However, with those doors now flung wide open, it is time to leave unfair group preferences which were never intended to be a permanent solution behind us.

Unfortunately, the array of Federal programs that accord special treatment on the basis of gender—some of them which are mentioned in the CRS study that was alluded to earlier—have already created an unhealthy national climate. This gender trap, as I like to call it, creates animosity among men who are trying just as hard to succeed in the workplace as women, as well among us women who do not want people thinking that we got where we are because of some goal or timetable or because of affirmative action, frankly.

Whatever one wants to call it, group preferences, affirmative action, quotas or group set-asides—and I know there are variations in the meaning of all those terms—what we have today in the form of almost 100 Federal policies and regulations is a system that has strayed far beyond what Presidents Kennedy or Johnson initially understood affirmative action to mean.

With the release of the Labor Department's glass ceiling report, we see that there are a lot of well-educated and well-intentioned people out there who measure a woman's success and progress not by whether women are being accorded equal opportunities to succeed or fail but by whether they are being proportionately represented in this or that level of management or in this or that particular profession. Without statistical evidence of discriminatory actions or attitudes, the Commission attributed the fact that only a small percentage of women occupy the highest positions in Fortune 500 companies to the glass ceiling phenomenon.

I think it is both simplistic and patronizing to conclude that women are constantly thwarted by invisible barriers of silent sexism and discrimination today and thus continue to need government set-asides or preferences to make it in the work force.

To many women, including those represented by the Independent Women's Forum, this mindset is as demeaning as it is flawed. Most significant, however, is the realization that tolerating gender preferences imperils the cause that true feminists originally championed—equal opportunity. The goal of equal access to and advancement in the work force, which I think we all here support, was never meant to be a guarantee that women would constitute some fixed percentage of managerial positions by the end of the century or ever, for that matter.

A careful reading of the Glass Ceiling Commission's own statistics suggests that in almost every segment of the work force, the

combination of equal opportunity and hard work has led to steady, impressive gains for most women. In 1992, women held 23 percent of corporate senior vice president positions versus 14 percent in 1982. That is progress. The percentage of all female vice presidents in those companies more than doubled in the same period.

From 1979 to 1993, women's wages increased by an impressive 119 percent. Meanwhile, of course, the percentage of male managers fell from 65 percent to 51 percent. And according to affirmative action scholar Jonathan Leonard at the University of California, none of these gains—none of these positive employment trends can be definitively traced at least to affirmative action.

The Independent Women's Forum and I think most women would cheer the conclusion that women's successes in the workplace are not due to social engineering but to women's perseverance and merit which they demonstrate when given a fair chance to compete. Oddly enough, some women seem to have a hard time swallowing the real progress women have made because acknowledging the reality that women today have equal access to virtually every field and procession also means acknowledging the dilemma that often goes along with these expanded choices, such as how to balance career and family, which we really haven't heard much about today.

Is it not possible that the relatively small percentage of women in senior management positions is due not to current discrimination but the fact that a lot of women choose to focus their priorities on other things or not work as many hours at a law firm or not work as many hours in a corporation? Maybe they find it more fulfilling to spend a little bit more time at home or be involved in civic activities.

These questions weren't even entertained at all in the Glass Ceiling Commission report. It simply doesn't make any sense to conclude that with women occupying over 40 percent of all managerial positions in American business—and I am not talking about just the Fortune 500 companies now—not to mention comprising nearly half of the work force and 51 percent of the population that our country's business leaders are sitting poised in some room figuring out how to displace women from top management positions once affirmative action policies are dismantled. Certainly if the Government advocates a merit-based, competitive approach to awarding grants or contracts, women are probably going to fare pretty well.

Of course discontinuing these gender preferences does not and should not mean and we do not advocate Federal—that in Federal enforcement or antidiscrimination laws should be reexamined or done away with. Discriminatory practices should continue to be deterred with appropriate statutory mechanisms. To brand those of us who want to see an end to preferential group treatment as racist or sexist, which unfortunately many feminists today continue to do, is demagoguery of the worse kind.

Such scare tactics are designed to accomplish one goal and that is to shut down debate about a very important issue. For a while, I think those tactics worked. I think people were deterred from talking about these issues because they were worried about being told that they wanted to turn the clock back and they—weren't

speaking up very loudly because people would say to us, "What, do you want all women back in the kitchen?"

Well, as last fall's elections demonstrated, I think Americans are beginning to question previously unchallenged government assumptions, and I don't think it is taboo any longer to argue that a municipality should not be deemed guilty of discrimination against women because they have a requirement in their fire department tests that firefighters should be able to carry a 150-pound person out of a burning building.

Whether Congress decides to pass a law prohibiting preferential treatment based on gender and whether women support such a move will reveal much, both about the way women are perceived and how they perceive themselves. Title VII of the 1964 Civil Rights Act provides that nothing contained in this title shall be interpreted to require quotas or preferences. The wording is not quotas or preferences, but it is certainly akin to that.

If we are going to be serious about discrimination and ending group based discrimination, Congress should amend that language to provide that nothing in title VII should be construed to permit gender, racial or other group preferences, quotas or set-asides. By demanding real and not rigged competition for jobs, promotions or admissions to academic institution, women will be fulfilling the true goal of early feminists. By refusing to be judged by different criteria from men, whether for a police academy test or as a business seeking a license from the FCC, women will erase any remaining doubts that they can't make it in the workplace.

And I think it is going to be refreshing when we hear for the last time comments such as: "She is a good female attorney" or a "bright female engineer" or an "experienced female pilot;" that will occur when people no longer have any cause to wonder whether a woman was promoted or hired for any reason other than individual talent. Women who succeed will be referred to as just plain good. I don't know many women who would not rather succeed knowing she did so on the basis of merit rather than because of some goal, timetable, or set-aside—regardless of how well-intentioned.

Thank you.

Mr. CANADY. Thank you very much.

[The prepared statement of Ms. Ingraham follows:]

PREPARED STATEMENT OF LAURA A. INGRAHAM, ON BEHALF OF THE INDEPENDENT
WOMEN'S FORUM

Thank you, Mr. Chairman. I speak on behalf of the Independent Women's Forum, and we commend you for holding these hearings today to examine federal policies, laws and regulations that encourage group preferences. Preferential group treatment, whether mandated, encouraged, or even tolerated by the federal government, raises serious questions about a principle central to the American spirit -- fairness. Thirty years after President Kennedy's Executive Order 11246, in which he first espoused the concept of "affirmative action," we as a nation committed to equal opportunity, must ask ourselves whether we have veered off course.

I first began thinking about the idea of gender preferences in 1980 as a high school student, when I heard then-presidential candidate Ronald Reagan, in whose Administration I would later work, promised that if elected he would nominate the first woman to sit on the Supreme Court. This somehow seemed wrong to me. I cer-

tainly believed a woman would make good Justice, but I also thought people were supposed to be judged without regard to race or gender. A decade or so later, as a law clerk at the Supreme Court, I grew to respect Justice O'Connor personally and professionally -- not because she was the first female Justice, but because she was a talented and dedicated Justice.

This coming Sunday some women will descend on Washington to protest what the National Organization for Women calls recent "tyrannical measures" against women -- such as the national groundswell for dismantling federal affirmative action programs. Rally organizers hope to persuade a public increasingly skeptical of group preferences that affirmative action is as crucial to the success of women in the workplace as it is for minorities. The tone of the press release announcing this rally resonates a siege-mentality, where women are being targeted for discrimination by men at every turn. Yet the rally literature makes no mention of the enormous gains that women have made.

Although we do not believe the majority of women in the United States share this pessimism, we are very concerned that if the federal government continues to countenance decisionmaking on the basis of gender,

women will be relegated to a permanent second-class status, where they are not held to the same standards as their male counterparts, and therefore cannot compete on the merits for jobs, education, or promotions. Of course, we recognize that affirmative action did tremendous things for women, by opening previously closed doors in employment and education. However, with those doors now flung wide open, it is time to leave affirmative action, which was never intended to be a permanent solution, behind. Unfortunately, the array of federal programs that accord special treatment on the basis of gender have already created an unhealthy national climate. This gender trap creates animosity among men who are trying just as hard as their female counterparts to succeed and prosper, as well as among women who do not want people thinking they got where they are got where they are because of affirmative action.

Whatever one wants to call it -- group preferences, affirmative action, quotas or set-asides -- what we have today in the form of federal policies and regulations is a system that has strayed far beyond what Presidents Kennedy or Johnson initially understood affirmative action to mean. With the release of the the Labor Department's Glass Ceiling Report last week, we see that

well-educated and intentioned people measure women's progress not by whether they are being accorded equal opportunities to succeed -- or fail -- but by whether they are being proportionately represented in this or that management level or in a particular profession. Without statistical evidence of discriminatory actions or attitudes, the Commission attributed the fact that only a small percentage of women occupied the highest positions in Fortune 500 companies to the "glass ceiling" phenomenon.

It is both simplistic and patronizing to conclude that women are constantly thwarted by invisible barriers of silent sexism and discrimination, and thus need government set-asides or preferences to make it in the workforce. To many women, including those represented by the Independent Women's Forum, this mindset is as demeaning as it is flawed. More significant, however, is the realization that tolerating gender preferences imperils the cause that true feminists originally championed -- equal opportunity. The goal of equal access to, and advancement within the workforce, which we all support, was never meant to be a guarantee that women would constitute some fixed percentage of managerial positions by the end of the century -- or ever, for that matter.

A careful reading of the Glass Ceiling Commission's own statistics suggests that in almost every segment of the working world, the combination of equal opportunity and hard work have led to steady, impressive gains for women. In 1992, women held 23 percent of corporate senior vice-president positions versus 14 percent in 1982; the percentage of all female vice presidents more than doubled in the same period. From 1979 to 1993, women's wages increased by a whopping 119 percent. Meanwhile, the percentage of male managers fell from 65 percent to 51 percent. Yet according to affirmative action scholar Jonathan Leonard at the University of California, none of these positive employment trends can be definitively traced to affirmative action. The Independent Women's Forum, and I think most women, would cheer the conclusion that women's successes in the workplace are due not to social engineering, but to women's perseverance and merit which they demonstrate when given a fair chance to compete.

Oddly enough some women seem to be having a hard time coming to terms with the real progress women have made. Acknowledging the reality that women today have equal access to virtually every field and profession, also means acknowledging the dilemma that often

goes along with these expanded choices -- how to balance career and family. Is it not possible that the relatively small percentage of women in senior-level management positions in business is attributable to any number of reasons having nothing to do with discrimination, such as the fact that women with children often choose to work fewer hours than their male counterparts, or that working mothers find it more fulfilling to channel their ambition into family rather than into work? These questions were not even entertained in the Glass Ceiling Report.

It simply makes no sense to conclude that with women occupying more than 40 percent of all managerial positions in American business, not to mention comprising nearly half of the workforce and 51 percent of the population, our country's business leaders sit poised to displace women from top jobs as soon as federal affirmative action policies for women are abandoned. Certainly, if the federal government advocates and demands a merit-based approach to awarding grants or contracts or to hiring, women will fare just fine.

Of course discontinuing gender preferences does not and should not mean abandoning federal enforcement of anti-discrimination laws. Discriminatory practices should continue to be deterred and penalized through the

appropriate statutory mechanisms. To brand those of us who want to see an end to preferential group treatment sexist or racist, which unfortunately many feminists continue to do, is demagoguery of the worst kind. Such scare tactics seem designed to accomplish one goal -- to shut down debate about a critical issue. For a while those tactics worked. But as last fall's elections demonstrated, Americans are beginning to question previously unchallenged government presumptions. It is no longer taboo, for example, to argue that a municipality should not be deemed guilty of gender discrimination because it requires that all fire fighters be capable of carrying a 150-pound person from a burning building.

Whether Congress decides to pass a law prohibiting preferential treatment based on gender and whether women support such a move will reveal much about both the way women are perceived and how they perceive themselves. Title VII of the 1964 Civil Rights Act provides: "Nothing contained in this title shall be interpreted to require [quotas or group preferences]." If we are going to be serious about ending group-based discrimination, Congress should amend that language to read that nothing in Title VII should not be construed to "permit" gender, racial or other group preferences, quotas or set-asides.

By demanding real, not rigged, competition for jobs, promotions, or admission to academic institutions, women will be fulfilling the true goal of early feminists. By refusing to be judged by different criteria from men, whether for a police academy test or as a business seeking licensing rights from the FCC, women will erase any remaining doubts that are not up to the task. It will be refreshing when we stop hearing things like "She's a good female attorney," or "a bright female engineer," or an "experienced female pilot." When people have no cause to wonder whether a woman was promoted or hired for any reason other than individual talent, women who succeed will be referred to as just plain good. I do not know any women who would not rather succeed knowing she was the best person for the job, rather than wondering whether it was because some goal, quota or timetable set by her employer.

Thank you.

Mr. CANADY. Ms. Archuleta.

**STATEMENT OF NANCY E. ARCHULETA, CHAIRMAN AND CEO,
MEVATEC CORP.**

Ms. ARCHULETA. Thank you very much for this opportunity to address the committee this afternoon. I come to you from the State of Alabama. I live in Huntsville, AL, but I am originally from the State of New Mexico. And I believe that—I am going to speak to you from my reference point of both of those States.

I run my business in Huntsville. It is a science and technology company. I am a participant in the Small Business Administration's 8(a) program, so I will also address my comments to that.

My views today aren't those of a historian. My views today are not presented as those of a statistician. They are simply presented as a consumer and as a taxpayer. It is with that in mind, please understand, that my testimony doesn't have lots of statistics in it and I am going to speak to you from the heart today. It is with great pride and commitment I offer you my testimony on affirmative action, not only as it pertains to MEVATEC as a business, but as it pertains to diverse cultures that are representative of this great Nation.

I might add that not only am I Hispanic-American, but I am also Native American, so I think you are getting a lot of double-dips here, perspectives from various areas.

I would like to begin with the fact that much press has been given to the subject of affirmative action which has sadly become a wedge issue with little or no regard for its founding principles. It would be quite easy and possibly convenient to focus merely on particular numbers and data revolving around this heated issue, but to do so would limit my ability to offer any type of realistic and constructive input. With this in mind, I hope to offer you, provide you a synopsis of thoughts and recommendations.

I would like to tell you just a little bit more about myself and my business. I was born in New Mexico. I was born to a poor family. We come from a farm family that barely etched out a living. My father is a 100-percent disabled American veteran of World War II. And when I was 15, I dropped out of high school. I was pregnant. At that time, I would have graduated within a mere 8 months.

The reason I dropped out—a 4.0 average student with a scholarship to UCLA or one that had been offered to me, I had a counselor say to me that as a daughter of a poor family, I really ought to take typing and I really ought to do something that would help me earn money for my family rather than to think about going to college. I was very, very hurt. Because of the problems at home, I didn't dare take my problems to my family. Instead, I dropped out. And it took me almost 10 years before I was able to drop back into life again.

Yes, I am a victim of discrimination and I sit before you today to tell you that affirmative action, equal employment opportunity, and all of the things that are at stake here, all of the things that these historians have told us about and all of the statistics mean nothing until you have experienced on a firsthand basis someone telling you, I can't give you a loan because you are a woman in

manufacturing and a woman in manufacturing will never make it. So that is the perspective of my testimony.

Affirmative action laws were originally designed to provide assistance to both minorities and women by establishing requirements for utilization of same. At that time, the laws were basically looked at to address social issues that would remedy past discrimination. However, since its inception, affirmative action has become a strong factor affecting the economic stability of our Nation.

Many organizations, the Latin American Management Association included, of which I am its chair, will always advocate for higher numbers in employment and contracting opportunities for minorities and women, as well we should. It should be noted that we recognize that such programs have been central to the economic development in our given communities, and while we recognize that they—the programs—must be streamlined and enhanced, we applaud the accomplishments of these programs. It would be a travesty to hinder those programs on the basis that they have finally proven successful.

Although the—and the statistics from the glass ceiling have already been talked about. What I would like to say that as we look at—as I mentioned before, this is not a social issue but rather one of simple economics as evidenced by the fact that there are now approximately 6.5 million owned firms that employ more people than all of the Fortune 500 firms combined.

This should not be viewed as reverse discrimination towards males but simply a program that works for change which has in turn created economic diversity.

In short, affirmative action works. It is an economic issue. It is not an immigration issue. It is not a social issue. It is an issue about putting money in the pockets of people that pay taxes.

On the issue of minority-owned firms, it should be noted that these type of firms generally employ more minorities than do their big business counterparts. This fact alone indicates that minorities are assisting in the decline of the welfare support by putting people to work that are normally overlooked in the hiring process. Again, is this a social issue or one of economics?

I could go on and on with additional data and figures that would support affirmative action and set-aside programs, however that data is public knowledge and we choose to either look at it for what it is worth or for what we are politically inclined to accept.

I would like to comment on something that was asked of the earlier panel about fraud and the use of fronts and how certain companies have appeared to be fraudulent. I have been approached by many white males asking me to use my company as a front for them. Doesn't that make them law breakers as well? Why is it that only the participants in these programs are viewed as the fraudulent ones? It is the participants, too. It takes two, like everything else.

And yes, I would strongly endorse that we implement strong, strong penalties, that it be a felony to use a front but impose it on both the person that allows themselves to be the front and those that use them as a front.

Today my testimony is based on the impact of affirmative action in my company and I agree that the 159 or so affirmative action

laws is excessive, and it is a tremendous drain on my company in terms of the amount of money that we have to spend to meet all of the requirements. I can attest to those cumbersome regulations and the implied quotas such as those mandated in Executive Order 11246. The spirit of those laws is necessary but the regulations and implementation are negative to everyone concern.

I wholeheartedly endorse Senator Dole's remarks to the Congress on March 15, 1995 in which he stated, "Let's remember that to raise questions of affirmative action is not to challenge our anti-discrimination laws. Unfortunately, America is not the colorblind society we would like it to be. Discrimination continues to be an undeniable part of American life."

If we are to make affirmative action work, we must make the rules far more user friendly. Today, noncompliance can result in the loss of a government contract to a company, even if that company has done everything possible to comply with the law. This is threatening to business. However, without the affirmative action requirements, even our business could lapse into hiring those that are alike.

There is minimal risk in hiring the people you go to church with or play golf with or see on a day-to-day basis as opposed to going out and recruiting and hiring the unknown. In my business, I have found that diversity contributes to the bottom line. This has also been attested to by others, both large and small businesses.

As a recipient of opportunities provided by the SBA section F, 8(a) program, I can attest to the fact that if it were not for that opportunity, I would not be here today testifying as an accomplished example of laws that work.

I appreciate the opportunity to testify before you today and would like to close by asking the committee to review the regulatory process associated with implementing actions that are needed. We cannot and must not lose sight of the fact that there still exists wide marketplace discrimination against minorities and women, especially African-Americans and Hispanic-Americans and that business development opportunity programs should not be viewed as social programs. These business development programs result in tax and employment creation.

It is a difficult issue. It has been called a complex issue. I implore you to do what is morally and ethically correct and move beyond what would be politically expedient.

Thank you very much.

Mr. CANADY. Thank you.

[The prepared statement of Ms. Archuleta follows:]

PREPARED STATEMENT OF NANCY E. ARCHULETA, CHAIRMAN AND CEO, MEVATEC CORP.

My name is Nancy E. Archuleta, the Chairman, Chief Executive Officer and Owner of MEVATEC Corporation located in Huntsville, Alabama. MEVATEC is predominately a science and engineering company that provides high-technology goods and services to the Federal Government, as well as the commercial sectors. I am currently the Chairman of the Latin American Management Association (LAMA), a national organization representing not only Hispanics, but women and other minorities as well. LAMA's predominant goal is to promote business opportunities for minority firms by establishing advocacy support networks designed to enhance contracting opportunities, legislative policy, and general business understanding.

It is with great pride and commitment, that I offer you my testimony on Affirmative Action, not only as it pertains to MEVATEC as a business, but as it pertains to the diverse cultures that are representative of this great nation. I would like to begin by addressing the fact that much press has been given to the subject of Affirmative Action which has sadly become a wedge issue with little or no regard to its founding principles. It would be quite easy and possibly convenient to focus merely on particular numbers and data revolving around this heated issue, but to do so would limit my ability to offer any type of realistic constructive input. With this in mind, I hope to provide you with a synopsis of thoughts and recommendations.

The Affirmative Action laws were originally designed to provide assistance to both minorities and women, by establishing requirements for utilization of same. At that time the laws were basically looked at to address social issues that would remedy past discrimination. However, since its inception Affirmative Action has become a strong factor effecting the economic stability of our nation. Many organizations, LAMA included, will always advocate for higher numbers in employment and contracting opportunities for minorities and women. It should be noted that we recognize that such programs have been central to the economic development in our given communities and while we recognize that they must be streamlined and enhanced, we applaud the accomplishments of these programs. It would be a travesty to hinder these programs on the basis that they are finally proving successful.

Although the statistics show that we still have not reached parity, programs such as Affirmative Action and the Small Business 8(a) Program have definitely assisted in "leveling" the playing field. In a recent article written in *NEWSWEEK MAGAZINE* titled "Holes in the Glass Ceiling", it states that women have seen an incline of nearly 7% in the number of senior level positions over the last two years which in itself is admirable. People need to realize that within this incline, the number of women and minorities combined still only represent 5% of the senior level positions within the Fortune 1000 companies. Again, progress is good, but far from complete. As I mentioned before, this issue is not a social issue but rather one of simple economics as evidenced by the fact that there are now approximately 6.5 million female-owned firms, that employ more people than all of the Fortune 500 firms combined. This should not be viewed as reverse discrimination toward males, but simply a program that works for a change which has in turn created economic diversity.

On the issue of minority-owned firms, it should be noted that these type of firms generally employ more minorities than do their big business counterparts. This fact alone indicates that minorities are assisting in the decline of welfare support, by putting people to work that are normally overlooked in the hiring process. Again is this a social issue, or one of economics? I could go on and on with additional data and figures that would support Affirmative Action and set-aside programs, however, that data is public knowledge and we can choose to either look at it for what its worth, or for what we are politically inclined to accept.

Today, my testimony is based on the impact of affirmative action in my company and I agree that the one hundred and fifty-nine Affirmative Action laws is excessive. As a business governed by those laws, I can attest to the cumbersome regulations and the implied quotas such as those mandated in Executive Order 11246. The spirit of these laws is necessary, but the regulations and implementation are negative to everyone concerned. I wholeheartedly endorse Senator Robert Dole's remarks to the Congress on 15 March 1995, in which he stated, "lets remember that to raise questions of Affirmative Action is not to challenge our anti-discrimination laws...Unfortunately, America is not the color-blind society we would like it to be. Discrimination continues to be an undeniable part of American life." If we are to make Affirmative Action work, we must make the rules far more user friendly. Today, non-compliance can result in the loss of a government contract

to a company even if that company has done everything possible to comply with the law. This is very threatening to businesses.

In my business I have found that diversity contributes to the bottom line. This has also been attested to by others both large and small. As a recipient of opportunities provided by the SBA Section 8(a) Program, I can attest to the fact that if it were not for that opportunity, I would not be here today testifying as an accomplished example of laws that work.

I appreciate the opportunity to testify before you today and would like to close by asking the committee to review the regulatory process associated with implementing actions that are needed. We can not and must not lose sight of the fact that there still exists widespread marketplace discrimination against minorities and women, especially African Americans and Hispanic Americans and that Business Development Opportunity Programs should not be viewed as social programs. These Business Development Programs result in tax and employment creation. It is a difficult issue, but I implore you to seek to do what is morally and ethically correct and move beyond what may be politically expedient.

Mr. CANADY. Finally, Professor Broadus.

**STATEMENT OF PROF. E. JOSEPH BROADUS, GEORGE MASON
UNIVERSITY SCHOOL OF LAW**

Mr. BROADUS. Good to see you again, Mr. Chairman.

Mr. CANADY. Thank you for being here.

Mr. BROADUS. For the sake of brevity, I will submit my complete statement into record.

Much of what I have to say has been covered already, the need for a dialog, the amount of conflict occasioned by the existence of these programs, the need for a thorough study—studies that can serve as a basis for the dialog. And some other factors, I think that a lot of these programs or so many of them emerged each with their own separate logic and, to a certain extent, there isn't a kind of underlying systemic rationale that unites all the programs.

A high level of generality is something that supports them and each program is making a system out of them that the people can understand and the public can support, we don't have that. That is part of the reason why you have the divergent system people supporting affirmative action, if the word is affirmative, and opposing preferences, if the word is preference. So much is covered by these programs and so much is heard about these programs and we really need a full discussion and debate of these programs.

To talk about the case law for a moment, there is—talk about how these things came up on the judicial side, there has already been a mention to *Griggs* and we know that the mechanism in *Griggs* was to create this disparate impact; that is, when a facially neutral test had a greater impact on members of the minority group than it did on members of the majority group, then that has to be a business necessity justifying that practice.

We talked about it today largely in terms of test validation. But it is that desire to arrive at the appropriate numbers, whether they are defined by a simple percentage rule in a regulation or a statistical model by the courts. It leads people to believe there are quotas because people seek safety in arriving within the safe zone, wherever those numbers are, and establishing procedures that will bring them to that safe zone.

One of the things that happened in the evolution of the case law was *Connecticut v. Teele* which involved multiphased systems in which the court essentially eliminated for a period what was called the bottom line defense. That is you could search for that safe zone and arrive at an appropriate set of numbers. In *Teale*, the court said you have to go back in and check at various stages of the process.

Earlier there was this question about the Chicago policeman and whether or not having the stage where you went to the bottom and then picked some people out, it seems to me that that system was reminiscent of *Teale* because the objective of *Teale* was of course to insulate the personnel system from a challenge by producing up appropriate bottom line numbers so that you couldn't say minorities had been hindered by the testing system because it would come out within two standard deviations and the court—the court found that offensive.

The problem at the end of the *Teele* case, of course, was that the model for, you know, for direct discrimination and the model for disparity impact were in tatters because it was difficult to find any safe harbor within disparate impact and the response of the court was *Wards Cove*. Having sort of tattered the model, it came back and said it was never in our jurisprudence, never in our jurisprudence that statistics alone could establish proof of discrimination and that led to the Civil Rights Act of 1991, attempting to re—reversing *Wards Cove* and trying to reestablish something inside of the system.

This entire period has been one when the court has struggled with attempting to get these models to work, and I think it is interesting that the model for disparity impact and disparity treatment that occurs in title VII law was adopted from the 8(a) 1, 8(a) 3 dichotomy in labor law and the same thing that happened with *Connecticut v. Teele* happened with *Exchange Parks* in labor law.

At some point, each one of these cases is in a collapse towards the center where the court has not been able to keep the systems separate. It has created some period of confusion how it affects policy and the court has done a much better job in the labor law area in establishing new rules to separate out the two systems and get them to function properly.

And it seems that what must happen is that now that—these problems are repeatedly going to have to be solved by Congress, although it doesn't—for a long time hasn't wanted to do it precisely because they are so explosive. It was better to let these things be handled by the court which was insulated by live tenure. But now for an array of reasons, these questions have been politicized and Congress will have to address them, and it is going to have to form a new national consensus if these programs are going to work and it is going to have to find some set of agreements over which one of these programs it has to support for American people.

Thank you.

[The prepared statement of Mr. Broadus follows:]

I. Group Preferences

Group preference is a term that describes a variety of programs intended to compensate minorities for past discrimination. Intended to aid the process of social integration, the programs have become a major stumbling block on the road to intergroup harmony. Majority group members argue the programs constitute reverse discrimination in which innocent non-minorities are punished for the wrong doing of prior generations. Defenders of preferences claim they are simple justice and needed reparations for past injuries.

The general moral consensus which once supported affirmative action is fragmented and reflective of the conflicting moral and practical strains produced by the programs. In the place of consensus is a heated dialogue between the champions of the old orthodoxy and those who express a growing moral concern with the concept of **allowing** rewards to be based on

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race, gender or some other factor widely viewed as irrelevant. But, fortunately there is also a solid core of Americans who remain firmly committed to building an equal opportunity society and aide to the disadvantaged while holding concerns for fairness. This division for the first time create for Congress and the nation an opportunity to do what hasn't been done in the thirty year history of modern civil rights law: a reflective policy review of groups preferences. Recognizing that passion run high Congress must not be intimidated by the cries of racism or charges that the gains of the past are being abandoned. Instead it must recognize that the present system is largely the product of accident; and that little evidence strongly supports the impact let alone the superiority of these methods.

Further, it must be will to consider that the present moral assumption underlying group preferences may be both remote from and even alien to the concerns with basic fairness which motivate many Americans to accept the system. Allocation of benefits based on group membership rather than merit may cause more than intergroup conflict. It may alter the nature of society from one committed to achievement to one concern with mere accumulation of wealth.

Congress should start from the growing body of concern with whether the negative moral and practical external cost of group preferences outweigh the claimed gains. And it must be willing to

conduct that debate in a way which will lead all Americans to understand that change does not equal the end of the American dreams.

No doubt the changed economic circumstances of the nation and the shift in outlook from optimism to concern have largely contributed to change. This fact and the tone of the controversy has been enough to intimidate prior debate. It must not happen again.

The debate once contained in the judiciary has become focused on proposals for reform in Congress, and the California Civil Rights Initiative -- a proposal that would limit the ability of the state government to undertake voluntary affirmative action programs in areas of employment, education, and contracting.

II. Origins

Some would trace the roots of contemporary group preference programs to efforts such as the Freedman's Bureau which were instituted following the Civil War and intended to aid former slaves in the transition to freedom.

In **Griggs v. Duke Power**, 401 U.S. 424 (1971), the supreme court expanded the range of Title VII protection in

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an innovative and far reaching way. The court held that in addition to prohibiting intentional discrimination Title VII prohibited practices that were fair in form but unfair in fact. Griggs analysis would bar any employment practice that resulted in disparate impact on minorities. Employers would have an obligation to account for any employment practice which resulted in higher success rates for majority members. The federal Equal Employment Opportunity Commission established an 80 per cent rule holding that any employment practice where the success rate for minorities fell below 80 per cent of the rate for majorities would be presumed discriminatory. Courts applied a more involved statistical model but in either case employers were under pressure to produce up appropriate numbers.

Only by coming within the courts statistics or the agencies rule could employers hope to escape the expensive of litigation. Critics charged that the rules established quotas in violation of Title VII legislative history and the spirit of the act which was intended to prohibit race as a consideration in employment.

While Griggs involved a Title VII, employment case, the effects were far reaching as the court has attempted to craft a uniform body of law to apply to the nation's various civil rights enactments.

Griggs created a pressure on employers to undertake affirmative action programs. Title VII, itself permit programs without requiring them. Under EO 11246, however, employers appeared to be obligated to undertake affirmative action. In **Weber v. Kaiser Aluminum & Chemical Corp.**, 443 U.S. at 215, the court acted to ease the employers' doubt. Employers were permitted to undertake affirmative action programs without fear of reverse discrimination law suits as long as the programs were limited.

The theme struck in **Weber** about appropriate limits was picked up by the Court in **Regents of the University of California v. Bakke**, 438 U.S. 265 (1978) in which the Court imposed restrictions on the ability of state governments to craft voluntary affirmative action programs. Because the constitution limited the ability of state governments to classify their citizens by race the state's could only use race in compelling circumstances and then only if safeguards were taken. **Bakke** imposed a set of confusing requirements that have insured continued litigation in this area. The practical effect of **Bakke** appears to have been de minimis. It is only necessary for the state agency to create the appropriate verbal fog that permits it to classify race as one of many factors considered and not the single dispositive factors.

The situation is further confused by the Court's holding in **Fullilove v. Klutznick**, 448 U.S. 448 (1980), there the Court held that the fourteenth amendment which limited the states ability to consider race was a grant of power to Congress to freely legislate on the basis of race where its objective were remedial. In **Fullilove** the Court upheld a set aside programs. In **City of Richmond v. Croson**, a similar set aside program set up by a local government was held to be unconstitutional. The Court would impose strict scrutiny on state and local program while granting great deference to federal determination.

The authority of Congress to enlarge, abolish or restrict the programs appears well established. The capacity of states, however, to restrict affirmative action programs may be limited. In **Hunter v. Erickson**, the court held that state laws which prohibited the ability of minorities to remedy past discrimination violated their rights to political participation. An even more sweeping reading of **Hunter** was applied by the Colorado Supreme Court recently in **Evans v. Romer**, applying **Hunter** protection to any identifiable group that might suffer discrimination.

This disparity in remedial powers between the states and the federal government may make it necessary for Congress to play a leading role in any significant

reform of affirmative action. This may come as actual substantive change in federal policy but it may also include authorization for states to take steps that might otherwise offend Hunter political participation considerations.

The difference between private sector and public sector actors and programs initiated by state or federal authority has created a confusing body of case law. But a few principle do emerge from the cases. First, private sector actors will have greater freedom to create programs -- particularly in the area of employment where they are under some statutory pressure to do so. Public sector actors must proceed with caution. Federal programs have the greatest range of discretion while state and local programs are held to a high standard.

In recent years the Court has expanded its examination of race based criteria from areas such as employment, education and contracting to direct consideration of political question under the Voting Rights Act. In *Shaw v. Reno*, 61 LW 4818 (1993) the Court held that whites were entitled to bring action challenging racially gerrymandered districts. And in *Holder v. Hall*, 62 LW 4728 (1994), and *Johnson v. DeGrandy*, 62 LW 47 (1994), the Court refused to extend a moral liberal reading a Congressional enactment designed to cure past racial wrongs. Instead the court insisted on giving equal weight to the competing political interest of majority group members. While

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these cases are still tentative in their departure from a ready acceptance of a system of racial spoils they suggest the court is will, at least, to limit the expansion of the system.

The new cases may have done no more than to have attached the **Bakke** considerations to the Voting Rights cases. But in doing so they have broken with a tradition of giving a broad remedial reading to Congressional enactment. While not abandoning **Kluznick** and its broad grant of power to congress, the newer cases merely refuse to acknowledge the exercise of the power without the clearest expression of Congressional intent.

This is non-the-less a disturbing signal to those who express a faith in an orthodox view of affirmative action. For it suggest the legislature must speak clearing if affirmative action programs are to survive. Congress, however, has always been willing to let the courts and executive branch fashion the politically offensive details of such programs.

III. Goals

A critical issue in the group preference or affirmative action debate relate to the ends of equal employment opportunity law. Is it the intent of the laws to merely create a level

playing field by baring consideration of race and other prohibited categories ? Or is the goal of the law redistribution ? Is the law intended to produce outcomes ?

Opponents of affirmative action claim the law is only about fairness. The law is about creating an environment in which race, etc. is not a factor. But, the supporters of affirmative action argue that the law is all about outcomes. Non-discrimination is merely a means to an end. The end is the reversal of the pattern of society in which blacks and other protected classes were disproportionately poor.

These proponents argue that special steps are necessary to redress historic injustice. They speak of balancing the books between blacks and whites as groups. Opponents refuse to accept the notion of historic injustice or group rights. Only individual have rights or commit wrongs they argue. Remedies should be for present victims of present wrongs.

Once an academic consideration the debate over affirmative action has grown louder as the system has expanded from narrow confines to larger spheres of public life. Further, it has become more controversial as the list of groups subject to it has been expanded.

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Most people think race when they think group preference affirmative action. But in fact the greater number of beneficiaries may well be women. This has created a split among some supporters of affirmative action between racial minority leaders and leaders of women's groups. This may well illustrate one of the concerns of critics. This system of status based spoils tends to lead to intergroup conflicts not harmony.

Mr. CANADY. Thank you. We have heard from both sides of this issue. I am sure there are some people who like the system the way it is, there are some people who perhaps would like to do away with the system entirely, and others that would modify the system.

Now, let me ask you, Ms. Bryant, as a supporter of the basic framework of affirmative action, as you have described it, that is in place, do you see any problems with the current system? Are there things that you would change in the system today? And do you see any negative aspects, any things that the system results in, that are unfavorable, that cause harm? Although on balance you have made the judgment that it is a good system, are there things in the system that trouble you?

Ms. BRYANT. I think as you have said, and as I have said, on balance, affirmative action is still needed. As with any broad based system like affirmative action, there may well be abuse. There has been a study recently put forward in a draft basis done by a professor from Rutgers University that was in the paper last week, that indicates that I think it is .002 percent, 6 out of 3,000 cases at the Federal and appellate courts, that there could have been a problem of reverse discrimination.

That is an issue that shouldn't happen. But we have laws to address that.

I think what is dangerous about this conversation isn't that we shouldn't assess it. President Clinton has called for an assessment of these policies and programs. It is that there is a kind of premise that we ought to throw the baby out with the bathwater. I think that is the problem—

Mr. CANADY. Whose premise is that?

Ms. BRYANT. I think what you heard Senator Dole say, and he was quoted on the good side of what he was saying, but I think he was calling for a real question about whether we should still have these. There have been people testifying here that think that we should no longer go forward with affirmative action. That to me is throwing out the baby with the bathwater.

Mr. CANADY. Well, I think what I have heard people say is, there are certain aspects of the present structure that are troubling to them, particularly aspects which specifically provide preferences to individuals on the basis of their race, gender or ethnic background. But let me go beyond the issue of reverse discrimination.

Again, there can be disagreement about that. That is an aspect of the system that is very troubling to some people. But there are other aspects of it that are troubling even to some of the people who are supposed to benefit from the system.

Now, we have heard some polls quoted, and there was a little dispute about what the polls say. I am not going to get into the specific numbers of a poll, but I think it is fair to say that if you look at the polling data you will see that at least a significant minority of the folks that are in those groups that are supposed to benefit from this system are troubled by the idea of preferences at least, or certain other aspects of the structure of affirmative action.

Why is it do you think that they are troubled? What is it that bothers them? Do they have any legitimate concerns?

Ms. BRYANT. I can't think of one American who would like to see unfair preference. But we have a system that has been dealing

with preferences all of our lives. We have preferences for veterans. We have preferences in college admissions for alumni's children. We have preferences for geography distribution. The fact is when preference is going to help build a diverse work force or campus climate, then it is a positive kind of way to look at building a multi-cultural workplace or campus.

Mr. CANADY. Let me ask you this. One argument that has been put forward by opponents of preferences is that they tend to stigmatize the people who are within the groups that benefit from them. Do you think there is any credibility to that argument?

Ms. BRYANT. I think there are some people who believe that. I as a woman do not feel a problem that I in fact was admitted to a graduate program with the faculty member saying, Guess what, we really don't have enough women. I said to myself, Here is an opportunity to show them I am just as good. Did it offend me? Not in the least.

Mr. CANADY. Do you think it offends some women?

Ms. BRYANT. Clearly some are, when we are 51, 52 percent of the population. I don't get offended.

Mr. CANADY. What do you think about the position of the Department of Justice in the *Piscataway* case?

Ms. BRYANT. I am not familiar with it.

Mr. CANADY. Let me go back to the question I asked earlier and ask if there are any other members of the panel that would like to address the negative aspects, particularly the issue of stigmatization, which I think is a legitimate issue that has been raised by some folks who are supposed by benefiting from the current system.

Mr. Broadus.

Mr. BROADUS. I think there is an issue there, but I think there is a more subtle issue that occurs when these systems become so visible.

Forty years ago, 50 years ago, minority children, African-American children were told they would have to work tougher, harder, they would have to be better, the world was bad out there, but they could make it, you know, if they applied themselves. And that is what people were told.

I am a little concerned—and about the kind of pervasive atmosphere that exists, if people are saying that the only way people can make it is if there is something out in the system that makes it work rather than something inside the person, whatever those hardships, that are going to make it work.

Now, every person has to work that through themselves in working through the system. But, you know, there is a tendency for this message to be out there that, you know, something outside of you has to make it work. I think people have to get the message that something inside of you has to make it work.

Now, speaking from personal experience for a second about something that concerns me, at my university I serve on two committees, I serve on admissions and I serve on academic standing.

Now, admissions wants a class that looks like the community that we serve. And in order to do that, we have to admit students who are fully qualified but below our profile. That means that they can succeed in law school, but there is a certain statistical prob-

ability that that is going to be more difficult for them. And we have admitted white students below the profile, and we have admitted minority students below the profile. It is something that routinely happens. It is not an exceptional kind of event.

There are reasons why you admit students below the profile if you believe that for other reasons they will probably succeed. But when there is a pressure, when there is a special program that says you have to be more concerned to admit students below profile because of special category, and that gets to the other committee I serve on, academic standing. Because in that committee you get to review the mistakes you made on admitting below profile.

There are many fine young people who, had they been admitted to a school within profile, would have succeeded and didn't. We do them a favor. We do them a favor in an effort to produce a group in our class that looked—that was more representative? And in many—and that is a thing that I am worried about.

We have tried various methods to make that work better, and we know in America today most of the minority graduates of colleges and universities still are predominantly—from minority institutions, there is still a large role that they play. And I think in many of the cases institutions are making these kinds of overextensions. It doesn't say anything bad about the students or the institutions. It says there is pressure on them to make judgments beyond the margin, and then they don't have the capacity to—

Mr. CONYERS. Will the chairman yield briefly?

Mr. CANADY. I will yield to Mr. Conyers briefly.

Mr. CONYERS. I want to clear up, Professor, what is it that you are worried about? You said this is what I am worried about, and you were describing the profiles and that some were admitted below the profile. What is the worry here?

Mr. BROADUS. The concern that I have is that for each student there is a good match—and ideal match between the school and that student where that student will best achieve his objectives. And the best way to make that decision is for the school to make that decision looking at the student and looking at, you know, the most reasonable anticipated results of their admissions, and nothing else.

If there is some other pressure—

Mr. CONYERS. But it is not a perfect world. That is why you are on the committee. What is the point that you are telling us you are worried about?

Mr. BROADUS. I will tell you what I don't like seeing, Congressman. I don't like it when—I don't like it when I see some very promising young people who have a lot in their folder that recommends them, that could have very good careers, who have those terminated early because they weren't appropriately matched. That shouldn't happen. And there shouldn't be any pressure any place inside the system to make the decisions based on anything other than matching that student to his best prospects.

But if you have a system that says you have an obligation to produce out numbers, you have an obligation to produce out numbers—

Mr. CANADY. My time has long ago expired.

Mr. Frank.

Mr. FRANK. Let me just ask you, Professor Broadus, did the Federal Government make you do that? The project you are describing. Is that the result of some order of the Federal Government? Straightforward, yes or no, or maybe.

Mr. BROADUS. Yes.

Mr. FRANK. Are you doing that as an institution—we do have some nexus to what the Federal Government does at this hearing. I am concerned that we are blaming the Federal Government for the weather in Malaysia. I am just wondering whether it is the Federal Government that has forced you to do that?

Mr. BROADUS. Whether—

Mr. FRANK. That is a straightforward question. I would just like an answer. Is the Federal Government responsible for your having to admit those people that make you concerned?

Mr. BROADUS. I think that is done in direct response to affirmative action concerns.

Mr. FRANK. Does the Federal Government make do you it?

Mr. BROADUS. Yes.

Mr. FRANK. How? Under what rules of the Federal Government? What policy of the Federal Government is requiring you to do this?

Mr. BROADUS. Every institution has to file EEO reports on its admission statistics and on the other kinds of statistics, on all that. There are pressures there on every institution—

Mr. FRANK. I am sorry that you can't answer it more directly. I disagree, and I think there is in fact no reason to blame the Federal Government for this as for other things. As a matter of fact, I just want to make a couple of points here.

Ms. Ingraham, I must say I regret that you had misstated when you refuted Dr. Berry. She did not say that Asian-Americans and Jews would have the best jobs. She said if you went solely by test scores they would dominate the places at the best universities. That is a very different thing.

Ms. INGRAHAM. I do not agree with you.

Mr. FRANK. There is a very real difference between the statement about test scores and jobs. I think it is unfortunate you would distort it.

I also want to go back, I am sorry Mr. Smith isn't here, he read the most partisan, distorted statement about President Clinton that I have heard in a committee hearing in a long time. For example, he said, "Well, the Defense Department says you can't promote any white male who isn't disabled without special permission." That is nonsense as a description of the Defense Department it is policy in general. He apologized to me, he said, "Yes, that one was wrong." I think several of the things he said were wrong.

Now, I want to get back to this list that was prepared for Senator Dole, because what we have here is a calculated effort at distortion, and to blame affirmative action for all manner of things, economic and other problems that it has no responsibility for, and in fact this famous list that we have got of preferences says, we have included any statute or regulation, et cetera, which appears in any manner to prefer or consider race, gender or ethnicity as factors.

So preference now becomes consideration. In fact, dozens of these things simply say encourage you to deal with minority banks. One

says there should be bilingual information in the food stamp program in areas where a lot of people don't speak English. Suggesting that all of these things in fact are preferences is an example of distortion. It is an example of the kind of demagoguery Ms. Ingraham said she didn't like. No, we do not have a massive structure of preferences. Yes, there are some people who have cleverly played on the economic insecurities many people feel to blame African-Americans and women and others when they are not in fact involved.

And so I think we ought to be very clear what in fact is happening. I think the things Ms. Archuleta said, the things Ms. Bryant have said, yes, let's see if we can preserve the program while making the regulations work better, I am all for that.

With that, Mr. Chairman, I would reserve the balance of my time to be put into a pot for Mr. Scott.

Mr. CANADY. Mr. Watt.

Mr. WATT. Mr. Chairman, I don't have any questions of this panel. I will yield all of my time to Mr. Scott.

Mr. CANADY. Mr. Serrano.

Mr. SERRANO. I will not only yield all my time to Mr. Scott—

Mr. FRANK. This Scott preference is getting out of hand.

Mr. SERRANO. I would hope he mentions me in his statement.

Mr. CANADY. Mr. Conyers.

Mr. CONYERS. I will not yield Mr. Scott any time whatsoever. And we will ask him for some time if he feels so inclined.

This is a very troubling point here that has been raised by the professor. You presume you know and work with Roger Wilkens at the law school?

Mr. BROADUS. He is on the economics faculty of the main campus.

Mr. CONYERS. What is your answer?

Mr. BROADUS. He is on another faculty. I know him, and—I know him. I do not work with him.

Mr. CONYERS. I get it. Do you agree with him on these kinds of matters? You know, he is from a civil rights family and background. Did you know that?

Mr. BROADUS. I know that.

Mr. CONYERS. OK. What is the answer?

Mr. BROADUS. He was Assistant Attorney General.

Mr. CONYERS. Now that we all know Roger Wilkins, what is your relationship with him?

Mr. BROADUS. I have never met him. I visit our main campus once a year, Congressman.

Mr. CONYERS. Fine. Then I won't go into that line of questioning. The problem that concerns me, particularly since you are on the committee that determines who gets into the school, is why you feel badly if some kids don't happen to make it through school. I mean, a lot of people flunk out. A lot of people quit. It is unfortunately—as a matter of fact, some schools predict pretty accurately a large portion of the class will never graduate.

So why does that present such a concern to you when you said that all of them are qualified to come into the school but there may be something in terms of a profile variation, but you let them in

anyway, and some do succeed, as you have said. So what is the problem?

Mr. BROADUS. The problem is that, you know, you essentially get one shot at this thing, and I would rather be in the business of giving you your best shot. That is the problem. You get one shot at this, and I would rather see you have your best shot at it.

Mr. CONYERS. That is not a problem. That is a worthy goal. I agree with giving everyone their best shot.

And by the way, you must know that many law schools have programs for youngsters who haven't had a rich academic background or their preparatory courses for people going into law school, where they get a chance to prove—it is a summer program.

Mr. BROADUS. Our problem is that we are a little different from most law schools. We have an inordinate—as a matter of fact, we have a very serious quantitative deponent structured to the first year which has become increasingly more rigorous.

Mr. CONYERS. What does that mean?

Mr. BROADUS. Normally one can become a lawyer without having to apply statistical methods or applying kind of advanced mathematics or—you can simply do it on verbal skills and history.

We have a very large economic component in our program, so we begin to look for a student with a different kind of background. That has made it very specialized, because you are looking for people with both high levels of verbal skills and very good math skills. It is a very specialized thing we are looking for.

Mr. CONYERS. I won't go into your school's qualifications, we will be here longer than we have time for. But of course the people entering into your school are going to graduate from law school, whether or not they become lawyers is a completely different function of the state and its testing.

But let me ask you, on balance, where do you come down on the subject that brings us here today, affirmative action? As you know, there is a lot of tension about this. You are the only African-American on this panel. There was only one on the panel before.

Can you just tell me where you come out on this thing? There is a great push on to withdraw affirmative action, which is a wide variety of programs in many areas, both governmental and private.

So where are you?

Mr. BROADUS. On balance I distrust programs which are overly rigid in terms of being mathematical and on balance I believe you have to have programs that—if you are going to have programs they have to be programs that are targeted to need.

Mr. CONYERS. These are affirmative action programs you are referring to?

Mr. BROADUS. Those are affirmative action programs.

Mr. CONYERS. Which ones are we talking about?

Mr. BROADUS. You had obviously—basically you have several large sets, in employment, and—

Mr. CONYERS. I know we do, but which ones are the ones that are troubling you?

Mr. BROADUS. The ones that trouble me are ones that don't let you make the kind of specific examination of either program or what you are doing—

Mr. CONYERS. For example.

Mr. BROADUS. If in fact—and there is some evidence of that—if in fact, for example, you have—in fact—I am troubled, for example, by a program, what you are describing—now, if it is not remedial in terms of being related to a court order, if in fact you have a program.

Mr. CONYERS. Tell me about a program that troubles you in affirmative action.

Mr. BROADUS. I am going back over the program—

Mr. CONYERS. Just name one. My time is running out.

Mr. BROADUS. There is one that was described in Chicago, if that is not result—that is simply an action by the city, that is the troubling program.

Mr. CONYERS. That troubles you? That is one you heard about that troubles you?

Mr. BROADUS. Yes, if those are accurate descriptions and it is not abiding by a court order.

Mr. CONYERS. Are there some others? In other words, here we are in an important hearing and you are telling me you heard somebody talk about a Chicago case and that if it is true it bothers you, but don't you come to this hearing with an attitude about whether we should approve a change or drop or modify affirmative action, and if you do, what is it?

Mr. BROADUS. I tried to express that, that we should have targeted an affirmative action that attempts to meet known and limited needs.

I do not approve of the suggestion, for example, in California that the University of California has to, you know, rigidly reflect the population of California in degrees issued by the university have to reflect the population.

Mr. CONYERS. That is exactly I thought what you were doing at your university.

Mr. BROADUS. No; it is not.

Mr. CONYERS. You said—I thought that you said that.

Mr. BROADUS. We don't have—I didn't say we had a mathematical—

Mr. CONYERS. I didn't say that you did.

Mr. BROADUS. We are trying to be more representative, and I think you can make an effort to be more representative, and you can consider that when you look at applicants. There are a large number of things you can consider.

Mr. CONYERS. Would you do me one favor as we close this? Why don't you arrange to meet Roger Wilkins since you are both on the campus and he is a civil rights authority and you know a lot about him, and I do too? It might help if you even engaged him in conversation. I referred to an article he wrote in the Nation magazine, last week, March 27, the case for affirmative action.

Mr. CANADY. Ms. Schroeder.

Mr. CONYERS. Would you agree to—

Mr. BROADUS. Well, sure.

Mr. CONYERS. I can get the article for you. Would you agree to meet him?

Mr. BROADUS. I will gladly read the article and I think I have expressed my other concerns about the kind of subtle impacts overly relying on these programs may have on transferring poor people

with a sense of whether they have to achieve things for themselves or how much they rely upon the structure of the system to achieve things for them. I think that does tend to have a negative effect on people.

Mr. CONYERS. Have you ever let in anybody you thought you shouldn't let in and you thought you had to do it because of the Federal law or some report you had to fill out?

Mr. BROADUS. No, we have never let anyone—I made that clear. We have never let anyone in who wasn't qualified.

Mr. CANADY. The time of the gentleman has expired.

Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I come in at a very interesting time. You never let anyone in that wasn't qualified. I guess the one thing that I would be appreciative of finding out, because this is information I have never seen before, you apparently have some kind of test where you know who is qualified or who would do best at that school and who wouldn't. And as I say, some of our prior witnesses have testified how confusing tests are.

I know that the SAT tests and some of the Princeton testing scores they have been looking at for a very long time and found that tests alone don't predict. So what is it that you have that is 100 percent predictive?

Mr. BROADUS. It is not 100 percent predictive and we have run into those problems, and we change the formula every year. We compare what our predictions were last year against what we have in our class, and we change the formula every year just because it isn't perfect in an attempt to capture the information in every class. We are trying to find out what works.

Mrs. SCHROEDER. And you don't have the answer.

Mr. BROADUS. We don't have the answer and we keep changing it based on what comes in.

Mrs. SCHROEDER. And you haven't let in anyone you didn't think was qualified?

Mr. BROADUS. Everybody has been left in——

Mrs. SCHROEDER. Maybe if you wrote it down I would understand it better. What is the problem? I wanted to ask some other people questions and the 5 minutes go by very quickly if you could submit for the record the laws that you are concerned about that the Federal Government imposed upon you that force you to select qualified people that you don't want to select that you know won't work somehow because——

Mr. BROADUS. It is not that you know they won't work.

Mrs. SCHROEDER. I would think——

Mr. BROADUS. There are bigger questions about some people.

Mrs. SCHROEDER. If you could write it down, maybe I would understand it. Maybe it is late in the afternoon and I am being very slow.

I wanted to talk a bit about this concept of affirmative action, which has become such a negative word, but it always seemed to me that part of what we were trying to do was to teach people to fish mode, in I thought your testimony went very much to that, where you are saying you did get your dignity and self-sufficiency back and so forth.

One of the things I think in particular as regards to women has been they have been moving out into the small business community in the private sector at a phenomenal pace. In fact, some people are saying they are moving out faster—and yet when you look at the contracts they get from the Federal Government, it is about 1 or 2 percent.

So if they do so well in the private sector, why can't they do so well in the public sector?

Ms. ARCHULETA. Can I address that? One of the reasons is the variation. I will go back to Chairman Canady's question about stigmas, you know, maybe I am too old, but stigmas happen, whether we want to control them or not. I think stigmas are directly associated with the whole issue of presumption, the whole issue of classes, you are a woman therefore you can't do this.

As I said earlier, I went to the Small Business Administration for a loan to fund my company, and I was entering into the world of manufacturing, and I was told, "You are a woman, you will not make it in manufacturing, why don't you pick something else," as if it was a real choice.

So if those stigmas exist, then the presumption exists, and certainly discrimination exist, and so you have got a bad situation.

I am a woman in a high-technology business and I employ many white Anglo males, who by the way asked me to bring you all a message, and they all said they hate being called angry white males, because they work for a woman and they love it.

Mrs. SCHROEDER. Good for you. They have taught you to fish well or you have taught them to fish well. Something has worked.

Ms. ARCHULETA. The issue is that the presumption exists that we cannot perform the work.

Mrs. SCHROEDER. People bring their cultural bias, sometimes. I was interested in this law school thing because when I got into law school they let us in equally and the dean was so opposed to letting women in. He very proudly announced that they had let that many more men in, because they were sure we would never use it and that we will not need to be there and on and on.

I understand what you are saying, that people keep telling you you cannot do this.

I also think the testing issue that I heard both of you—I did one of the first hearings on affirmative action in the Federal Government and asked NASA why there were no women, and we were told it is because they didn't pass the weight test—oh, they had push-ups, they had everything. I am a pilot and I know that running a spacecraft is like milking a mouse. So having a lot of push-ups, you grab control of the controls of the spacecraft and you shake it to death. They had a test with no applicability to what they were doing.

And of course they have since changed that, and opened that up. But I think that is one of the things we have to keep bringing this back to, that there is a reason people have tried, and maybe we don't have the perfect formula yet, but we ought to be analyzing why only 1 to 2 percent of government contracts are going to women, and maybe we need to try harder to make sure they get their foot in the door to be able to compete.

And I don't think it means they are a lesser being. I think it means they don't get into the door or they can't find the door, somebody didn't tell them where the door is because they figure, immediately, oh, well, they couldn't do it.

Ms. INGRAHAM. If I could chime in a little bit, I think we are talking about why women don't get particular government contracts. There are so many regulations in place, and they are in the CRS study, discussing preferences in banking law, preferences in the communications industry—obviously the licensing issue recently came up.

Women are being accorded all kinds of preferential treatment and yet we seem to be sitting here saying women aren't doing well enough. And I think stressing education and all of those things are great because they don't involve any kind of group preferences. Those are the kinds of positive things that the Independent Women's Forum is advocating and applauding.

Mrs. SCHROEDER. I think there is no question we have opened a lot of doors in education that were not open when I was coming up. So I think affirmative action has done great things for women.

I think in the business community there are still a lot of problems. I helped pass the equal credit law. For 20 years the Federal Reserve Bank insisted on interpreting that to mean only consumer credit, because again, their mindset was that women would only want credit to buy things, not to start a high-tech company. We finally got that changed 2 years ago.

But it was as clear as it could be on its face that equal credit means equal credit, you look at their credit like everybody else's credit, but the Federal Reserve would sit there and look us in the eye and say, We know it means consumer credit and that is all we are going to look at.

Ms. INGRAHAM. Only now women have a leg up on everyone else other than minorities who are applying for loans. I work in this area of the law and I know a little bit about fair housing and lending laws.

Mrs. SCHROEDER. They have a way in, and they have a door they can get in, and it has been denied them for so long. So I think we have to—again, I really—the rancor of this debate is making me crazy, because if I listen to you, I sit here with gray hair and I want to say, What she is really saying is no woman has ever been qualified by yourself. And so—

Ms. INGRAHAM. Absolutely not.

Mrs. SCHROEDER. I don't think that is what you mean.

Ms. INGRAHAM. I think that is really unfair. I am saying there are women out there who are talented and competitive and who can get FCC licensing and get permits for all sorts of Federal work, and it is unfair to make me feel like I got there because of some preference program.

Mrs. SCHROEDER. But you wouldn't want her to say she is not qualified. She has gotten there, she is qualified.

Ms. INGRAHAM. Absolutely not.

Mrs. SCHROEDER. I think you have to be careful how you phrase it.

Ms. INGRAHAM. Just because someone happens to be the beneficiary of affirmative action doesn't mean they weren't qualified. That is not our point.

Mrs. SCHROEDER. But your testimony made it sound that way, that you were instantly tainted as undeserving but you get some kind of a prize.

Ms. INGRAHAM. No.

Mrs. SCHROEDER. That is why I am looking forward to seeing this in writing because I got the feeling that you knew who did best where. If you do, that is great, but I don't know anybody that is quite that—we are just trying to sort it out.

I know my time is up and I have to get out of here because I have another meeting I have to be at, but if we can somehow lower this rancor it would be I think very helpful because I think all of you are not that far apart, and to come in here and allow people to politicize it and see if we can't blow this country up over this issue is really the craziest thing we can do after the strides we have made.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you.

You have 12 minutes, Mr. Scott.

Mr. SCOTT. I would like to thank the gentleman from New York, the gentleman from North Carolina, the gentleman from Massachusetts, for yielding.

Mr. WATT. And the chairman.

Mr. SCOTT. And the chairman. Thank you very much.

Professor, you have a threshold where you figure people have to have at least a certain ability to be able to perform the work of the George Mason University School of Law, and you don't admit people that are unqualified to do the work.

Mr. BROADUS. No.

Mr. SCOTT. There is nothing in the law that would require you to admit people who are not qualified.

You indicated that you were disturbed by this Chicago situation. As I understand the Chicago situation, you have two groups of people, one who were selected after an evaluation of their actual past performance and ability to do the job, another group who scored on a test that, let's assume for the sake of argument, was culturally biased.

Now, of the group that was evaluated on actual merit, their ability to do the job, their past performance, and the people who passed this irrelevant test, which group were you disturbed with getting the jobs?

Mr. BROADUS. If we have an irrelevant test, if we have an honestly irrelevant test, no one should be hired under it.

Mr. SCOTT. So if the test hasn't been statistically validated, then it ought not be used at all?

Mr. BROADUS. Yes, if we don't have a validated test, we are not confident that it measures job relatedness, and that, you know, it is doing something, then we shouldn't use it. We should do all of the bases of merit or we should do a new test, but I don't know what purpose you would have by hiring some small number of people because they could do the job and hiring some larger number of people because you have this test.

If the test doesn't work, get rid of it——

Mr. SCOTT. Wait a minute. You indicated you were disturbed by the Chicago situation.

Were you disturbed because those who were selected on their ability to do the job were selected? Or were you disturbed by the people who had just passed this irrelevant test and then gotten 80 percent of the jobs?

Mr. BROADUS. I am disturbed because the Chicago situation seems to track the situation in Connecticut, which the court said was prohibited, because you had a routine testing system for choosing applicants, and in each critical stage of that process or at least at the critical stages of the process, you had a system for reintroducing minority employees to guarantee that you would get the proper kind of numbers to avoid two standard deviations so you couldn't claim it had an adverse impact.

It seems to me if you have a testing system that you believe in because you hire a large number of people under it and you have a second testing system which you believe worked and you implement it to, you know, produce some number, some identifiable number of minority candidates who succeed, what you are trying to do is shelter the ineffective system by incorporating numbers that rise above two standard deviations, and precisely what the court told us in *Connecticut v. Teale* was you could never shelter the bad portion of the test by producing up numbers.

So I am disturbed.

Mr. SCOTT. I am still confused about which group you were disturbed, with those that were selected by merit, their ability to do the job, or——

Mr. WATT. The Teale group.

Mr. SCOTT. Do you have a problem with—let me ask it another way. Do you have a problem with people being selected on their ability to do the job based on their past performance as supervisors, saying they could do the job? Are you bothered by them getting a promotion?

Mr. BROADUS. No.

Mr. SCOTT. Are you bothered by 80 percent of the jobs being taken by a group that can pass a test? Let me preface that by saying that you know in advance it is culturally biased.

Mr. BROADUS. If the test does not work, the test should not be used. We shouldn't be limiting appropriate—if you believe the appropriate test is judged by the method of—and there are problems with that. If you believe that is the appropriate model, then you shouldn't be doing the right thing 20 percent of the time. You should be doing the right thing 100 percent of the time. If the right way to do it is with some uniform test, then it should apply 100 percent. If the right thing to do is the other way——

Mr. SCOTT. Are you familiar with job testing?

Mr. BROADUS. Yes.

Mr. SCOTT. In virtually all of the job testing tests or job tests, is there a cultural, racial bias?

Mr. BROADUS. There is a claim for that in much of the job testing, but, you know, job tests have survived court challenges. So to the extent that they have, they fall below the current legal threshold.

Mr. SCOTT. Is it true or not true that most of these job tests are culturally biased?

Mr. BROADUS. I don't know most—there are hundreds of job tests. I don't know most of the job tests.

Mr. SCOTT. So that African-Americans, Hispanics, and women score predictably lower based on their predictive effect on how they are going to do the job.

Mr. BROADUS. Does that mean—are you saying they do not predict as well for African-Americans as they do—

Mr. SCOTT. Let me ask it another way. You had a group that was selected on merit, their ability to do the job. You have another group that took this test, however—and there were significant deviations on how they affected the population based on a racial and ethnic background.

Now, your question is whether you ought to take this test, culturally biased, which I think apparent based on the results, whether or not that is a better—

Mr. BROADUS. What you are saying—

Mr. SCOTT. Whether you ought to set aside 80 percent of the jobs for the people who take that irrelevant test and just 20 percent of the jobs for the people that could actually do the job, or whether all of the jobs should have been given by virtue of your ability to do the job. And you said you were disturbed with it.

I was just wondering whether you were disturbed that 80 percent quota for one group, totally irrelevant to their ability to do the job, and only 20 percent quota for those that actually could do the job.

Mr. BROADUS. And I think I said that I believe only job relevant tests should be used as a measure.

Mr. SCOTT. I am not sure, but I think we agree that your problem was with the 80 percent and not the 20 percent.

Mr. BROADUS. And there is a disparity—you shouldn't have, you know, one that it works and one test that doesn't.

Mr. SCOTT. Well, one was selected by merit based on an evaluation of people that actually saw people doing the job.

Ms. Bryant, you went through a little history of affirmative action. I think you pointed out that we all know what would happen in the marketplace if we eliminated affirmative action.

Without some affirmative action, what could we do about—we don't need affirmative action to deal with overt, blatant bigotry in terms of high practices. How would we, when people get a little more sophisticated and have these covert schemes, without affirmative action, how could we address racial discrimination for people that become more sophisticated?

Ms. BRYANT. This committee and the panel before us has said we are not trying to undo discrimination laws through these hearings. But I think if you take away affirmative action, take away the method we have to create a workplace or a campus that is fairer and that gives you the population that in fact can create a more tolerant workplace, not one with rancor, that could create a smarter workplace or a smarter campus, not one that is segregated.

So to me affirmative action, it is the positive way you get at the issues of discrimination by race, sex, or ethnicity. I think that we have got to focus on the positive aspects that affirmative action has brought. If there are problems with it, we should address them.

Nobody is saying here, or I think in Congress or the President of the United States is not saying, if there are problems, let's fix them. But to undo a system that we can prove over the last 20 years is making a difference so that women and minorities are getting a fairer opportunity, would be crazy. And I don't think any of us want that.

So to me affirmative action is the positive way you get at it, not legalistic way when it is too late. When the person has been discriminated against, then you bring in the laws.

Mr. SCOTT. Ms. Ingraham, if you eliminated affirmative action, how would you deal with covert, sophisticated racial bigotry?

Ms. INGRAHAM. I think that type of bigotry, which unfortunately still exists in the country, can be and will be dealt with through the antidiscrimination provisions of title VII and title IX of the 1964 Civil Rights Act.

No one here is saying that we should do away with any of those provisions, which if properly enforced, properly followed, will deter discrimination with sanctions, monetary penalties, and all sorts of tools, real discrimination that is out there.

Mr. SCOTT. Let's get back to the Chicago situation where if you assume for the sake of argument the test is racially biased, and that is how they are going to be hiring, without affirmative action, how would the Chicago Police Department stop discriminating?

Ms. INGRAHAM. I think if the test is proven racially biased, unless I am misunderstanding your question, it would violate the Civil Rights Act.

Mr. SCOTT. The fact apparently is that on evaluation of performance, minorities do well on this test, don't they?

Ms. INGRAHAM. I just don't see how that changes from the anti-discrimination provisions of the act. It can still be dealt with.

Mr. SCOTT. How would you—if that is the situation, without this 20 percent and you kept going on this test that minorities who do well, but people who watch their work don't do well on this test for whatever reason, how do you ever break that cycle without some affirmative step either going towards a merit situation, which everybody is apparently complaining against? How would you ever bring a case? I mean, that is the way they have been doing it. How do you ever change?

Ms. INGRAHAM. Affirmative action policies which involve opening doors and making sure that opportunity is equal for blacks or women or other minorities doesn't alter the fact that some of these tests aren't right and don't measure performance.

I don't think anyone is sitting here saying all tests are great or all tests are going to measure performance accurately. I mean, I think we are getting all these things confused by talking about one particular test or several tests that don't perfectly predict performance. If they don't, they should be remedied, they should be changed, and they can be changed and they can be challenged in courts through the discrimination laws on the books that were passed for an important reason.

And all of us agree on that. The only thing we don't agree on is whether numbers are indicators of when someone is discriminated against. Sometimes they will be. Sometimes there will be real evidence. A lot of times there won't. And I think it clouds the issue

to say that set-asides or preferences are everybody's concept of affirmative action.

Mr. SCOTT. There is a term in some cases called manifest imbalance. If you have got one of those because of past discrimination, how do you ever remedy that without some affirmative steps being taken? If you just have the agency or business declare itself or stop discriminating without numbers to measure——

Ms. INGRAHAM. I think there are all sorts of things we can do in this country that haven't been talked about today, aren't the subject of this committee, like putting more emphasis on inner cities, trying to stop crime, trying to give people hope in all sorts of areas in their lives, that will allow women and blacks and African-Americans, every minority out there, to compete with everybody else, and that is what we all want.

Mr. SCOTT. What if you have the employer as a racial bigot who will do everything in his power to set up schemes to prevent people, however well qualified, from coming in?

Ms. INGRAHAM. Those are called pretexts, and under the law those are ruses and not real measures or real testing schemes; and those can be challenged under the discrimination provisions of the statute. And those things aren't going to be—I don't see those things changing, and I hope that they don't.

Mr. SCOTT. Thank you, Mr. Chairman. I appreciate it.

Mr. CANADY. Thank you, Mr. Scott. Your time has expired.

That concludes our hearing today. I want to thank each of the witnesses, again, for being with us. We appreciate it.

As I have indicated at the outset, this is the first of a number of hearings we will be holding on this. I appreciate the attendance of the Members today.

Thank you. The subcommittee is adjourned.

[Whereupon, at 4:45 p.m., the subcommittee adjourned.]

GROUP PREFERENCES AND THE LAW

THURSDAY, JUNE 1, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
San Diego, CA.

The subcommittee met, pursuant to notice, at 9 a.m., at the County Administration Center, Board Chambers, 1600 Pacific Highway, San Diego, CA, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, F. James Sensenbrenner, Jr., and Michael Patrick Flanagan.

Also present: Kathryn A. Hazeem, chief counsel; Jacqueline McKee, paralegal; and Robert Raben, minority counsel.

Mr. CANADY. The subcommittee will come to order. Today the Subcommittee on the Constitution will hear from a number of witnesses on the issue of group preferences and the law.

In the 1960's, Congress enacted major civil rights laws to protect individuals from discrimination on the basis of race, color, ethnic origin, and gender. These laws were based upon principles of fundamental fairness and the moral and legal imperative that all citizens were entitled to equal treatment and equal protection under the law.

Unfortunately, the command of equal protection and non-discrimination has degenerated into a pervasive regiment of quotas and preferences imposed by both the States and the Federal Government.

We are here today in San Diego because Californians are on the cutting edge of restoring the original purpose of civil rights laws for their State. California is a State rich in diversity and many cultures. The people of this State, perhaps more than most others, are uniquely aware that racial and gender preferences, preferences handed out without regard to an individual's merit or qualifications, can be a divisive force in an already fragile society.

We all agree that affirmative action which involves recruitment and outreach efforts or which takes into account socioeconomic disadvantage can be an appropriate and effective tool for creating opportunity. Most people, however, are either deeply troubled by or entirely opposed to race and gender preferences which have a discriminatory impact.

Later this month, I plan to introduce legislation which will end the use of race and gender preferences by the Federal Government. The purpose of the hearing today is to examine race and gender preference policies and their effect on equal opportunity.

I want to thank Supervisor Greg Cox and his staff, especially Pam O'Neal and Jan Boujois for accommodating us in this effort, and Mr. Thomas Pastuska, clerk of the board of supervisors, and his staff for their assistance.

I want to thank the two members of the subcommittee who have joined me for the hearing today and I would like to recognize Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. Today the subcommittee begins hearings on ending a well-intentioned social program that has gone terribly awry, affirmative action which has evolved into mandatory goals and timetables, quotas and preferences.

It has put race against race. It has put gender against gender. It has put ethnic group against ethnic group. The time has come for the Congress to thoroughly examine the consequences of the well-intentioned affirmative action programs that were passed in the 1960's and 1970's. Gov. Peter Wilson of this State is doing the right thing today and signing an executive order starting to put an end to these types of practices in the State of California.

The Congress of the United States should do likewise. The reason we should do likewise is the results of these well-intentioned programs have been that less qualified people have gotten jobs, places at universities, and student financial aid ahead of those who are more qualified.

In the area of Government contracting, it has cost the taxpayers more with preferences and set-asides and it has resulted in endless litigation that has benefited nobody but the lawyers on both sides of the lawsuits.

So I salute the chairman for coming to San Diego today to start these hearings. I salute the chairman also for introducing legislation later on this month to try to put some sense in affirmative action programs. And I call on the President of the United States to start looking at the results of these programs rather than telling the people of this country that he's going to get to it sometime in the far distant future.

Thank you.

Mr. CANADY. Thank you, Mr. Sensenbrenner. Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman. I, too, commend you for having these hearings today here in California. And with the Governor having acted just this morning, I think it is all fitting and proper that we explore this issue thoroughly today.

I will tell you, also, that Chicago has recently had a bad experience with bad law and that is in the hiring of some policemen there and quotas were adopted, but they weren't quotas. Chicago worked very hard to comply with the law without actually having quotas and it is virtually impossible because of the construct of the law.

And as Mr. Sensenbrenner noted, what was a good idea has become a perverse system of preferences and quotas that simply is unworkable. It is uniquely un-American to preferentially treat one person or one class of persons over another because of something that happened a long time ago or may have happened a long time ago.

I will tell you, Mr. Chairman, it is outstanding to have these hearings today and I'm happy to be a part of it. I yield back.

Mr. CANADY. Thank you, Mr. Flanagan. Our first witness today will be Representative Brian Bilbray. Representative Bilbray, I appreciate your being here. Representative Bilbray was elected to Congress in 1994. He represents California's 49th District, which includes the city of San Diego. The subcommittee appreciates the assistance he and his staff have given us in putting together this hearing.

**STATEMENT OF HON. BRIAN P. BILBRAY, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. BILBRAY. Thank you, Mr. Chairman. Mr. Chairman, I'd like to welcome you to San Diego and the 49th District, where we are right now.

I would like to say that my testimony really comes from the experience of growing up in a very multicultural, multiracial neighborhood along the border. It also stems from administering the governments for the city of Imperial Beach, which is down on the border and is very diverse, and the First District of the county of San Diego, which we are also in, and for the county of San Diego, which I proudly say is one of the most culturally and racially diverse communities in the country.

We have had some very good successes that I'd like to point to later which really fulfill many of the goals of affirmative action without developing the problems that you've see across this country.

Mr. Chairman, my problem with the existing terminology or the definition of affirmative action is that we have justified violating a basic premise, by judging people by the color of their skin, rather than their character. What we have done with affirmative action is we've taken a well-intentioned, but misguided strategy and actually justified State-mandated discrimination based upon gender and race.

I think that no matter what the intentions were, the means do not justify the end. And, in fact, as somebody who has grown up and lived in a diverse community, the end is not acceptable. We have actually had a mixed result. In fact, if nothing else, a very adverse result of our well-intentioned strategies. The greatest victim of these misguided strategies is not the white male. It is actually the minority and the professional woman who is out there wanting to prove that they can perform as equals.

The affirmative action program, first of all, makes an assumption that certain parts of our population cannot compete on equal footing in our society without having some kind of Government-mandated subsidy. I think that that creates a continuation of what I would call very, very naive, and very prejudiced assumptions, that somehow there is an imbalance in the ability to perform.

The other issue it starts creating is called new racism. I think we've got a major concern that there are those individuals in our society, especially young adults coming up, who perceive that the playing field is not equal. They perceive that there is a preference for certain individuals in our society mandated by Government and that their position is to be relegated to a secondary post. This then generates a lot of prejudice that is aimed at the wrong target, indi-

viduals of color and women, rather than the real target, and that is the Federal Government and its misguided strategies.

A good example of this is a personal experience I'd like to point out to you. When I was mayor of Imperial Beach, we had a system where we hired a planning director. The planning director was heads above everybody else in the written test. When the oral test came through, there was no doubt about what was going on.

I was a young mayor at that time, about 27 years old, and probably pretty naive. I remember hiring on my first major department head, very proud that this man, who happened to be Latino, was hired-on to guide the city's future. What upset me was that the first thing I remember, walking down the hall, was somebody making the comment that Mr. Sanabal was obviously hired because he was a Latino and because of affirmative action.

They degraded this man's abilities, his accomplishment, his achievement, and, to me, that was when I started having second thoughts about this concept.

Now, when we get into this thing, we've got to point out that we are not only judging people by the color of their skin and their gender, but we are sending mixed signals. There are ways to address this problem. Mr. Chairman, I think that one of the things we've got to recognize is the existing structure of affirmative action that is being interpreted violates the concept of equal protection under the law. Frankly, I think this issue is going to be brought to a head.

We specifically have laws to stop this type of violation. Affirmative action programs also make an assumption that all women and all members of a minority are disadvantaged and poor and that all white males are somehow advantaged and wealthy. As somebody who comes from a working class background, let me assure you that is not true. I think that it's making assumptions that are wrong and immoral.

There are ways to address this issue by abandoning the quota system. In San Diego County, in these chambers, we developed a policy that has fulfilled the goals, to a large degree, without violating the concept of equal protection for everyone. What we do, Mr. Chairman, is set up a situation where the contractor in our affirmative action program is not required to have set percentages, and people are not denied contracts, just because they did not fall into a certain category that we had created.

What we do is require the major contractors to prove that they allowed minority and women contractors to bid on a percentage of the contract, and that they had access to competition. But they were not guaranteed a percentage of the take. So they were able—we made sure that there was not discrimination against minority and women—to compete in a free and open market. When that free and open market meant that somebody else got the contract because they underbid it, the minority and the female-owned, the woman-owned business, then they didn't get the business. But they did get the right of access, the right to take a shot. So we were able to do that.

Let me point out that I think we need to go back to the mistake that was made in the sixties, making gross racial and gender assumptions that you can't compete and that all people in one race

and gender have an advantage and are wealthy and those on the other are disadvantaged and poor.

I feel that maybe what we want to do, if we want to move this agenda, is go to the process of judging individuals by their individual situation. We may want to have affirmative action for those who are economically disenfranchised. We may want to base it on their personal situation; based not on the color of their skin, but on their economic situation. We have done that. Ever since the 16th amendment, we have been able to make differentiation between those who are wealthy and those who are poor. That can be constitutionally and morally protected.

But the system we have now cannot be justified by its results, which have perpetuated racial stereotypes and perpetuated prejudice and bad feelings between individuals that should be working together. It has also degraded those of color, and women who have accomplished the great things that we want to encourage, and destroyed the concept of setting role models for people. What we need to move back to is a concept that we are going to judge people by the content of their character, not by the color of their skin.

And with that should be our goal that we cannot justify racism to fight racism. We should set the example that we will not only not allow the private sector to discriminate, but we will not have the public sector mandating discrimination.

With that, I'll be available for answers, Mr. Chairman.

[The prepared statement of Mr. Bilbray follows:]

PREPARED STATEMENT OF HON. BRIAN P. BILBRAY, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF CALIFORNIA

Mr. Chairman, I want to thank you for the opportunity to present testimony before this committee regarding a subject that will doubtless consume a number of headlines for the foreseeable future. Additionally, I am honored that this subcommittee has chosen the beautiful city of San Diego, and on behalf of the constituents of the 49th district, I welcome you.

Affirmative action programs at the state, federal, and local levels are an idea whose time has gone. If we are truly committed to achieving a colorblind society, then abolishing government mandated discrimination should be our first step. At the same time, we must re-affirm our commitment to anti-discrimination laws to provide remedy and redress when discrimination actually occurs.

The problem with affirmative action programs today, is that they result in institutionalized, mandated discrimination. The practical evidence of the kind of damage done by quotas is multifaceted. First, they reinforce racial stereotypes, by judging a person not on their merit or worth, but on their skin color or gender.

Second, quotas foster the wrong-headed assumption that racial minorities and women are incapable of succeeding without this type of "special" assistance. The assumption that a minority or a woman may have been chosen for a job, or awarded a contract by virtue of being a minority or a woman, undermines the value of self-worth and individualism. What quotas suggest is that people are incapable of competing as equals in a free society.

Thirdly, we can not end discrimination by perpetuating even more discrimination. If we want to begin to level the playing field, we must eliminate set asides and quotas.

As a County Supervisor in this building, I helped institute a goals-oriented system for hiring contractors. The goal is to provide a level playing field and equal access. The county requires departments and contractors to actively seek out and encourage women and minorities to apply, bid or be included as a subcontractor in bid packages. This policy increased the pool of potential contractors. The most qualified and competitive bids were ultimately chosen from a larger and more diverse field.

The result is applicants and contractors feel they have been treated fairly and tax dollars are expended prudently. It is important to also note that the County of San Diego's equal opportunity policy has survived court challenges.

Our nation was founded upon the notion of equal rights and protection under the law. While it is important that we acknowledge discriminatory activities in the past, and learn to recognize discrimination today, the correct recourse for these acts is to rigorously enforce the resultant anti-discrimination laws. The answer is not to reverse discriminate. I support efforts in Congress to continue to strengthen laws which provide protection for all Americans from discriminatory practices.

I hope that through the activities of this subcommittee, this debate will continue to seek out unfair practices in federal, state, and local government, and not degenerate into race and gender based accusations and thoughtless diatribe. I look forward to hearing the testimony of the witnesses today.

Mr. CANADY. Thank you, Congressman Bilbray. I think you have provided an excellent overview of this issue and really hit on all the key points that need to be considered in this debate. I appreciate your being here today and your testimony is very valuable to the subcommittee.

Are there additional questions?

Mr. SENSENBRENNER. No.

Mr. FLANAGAN. No.

Mr. CANADY. Thank you, very much.

Mr. BILBRAY. Thank you very much.

Mr. CANADY. We appreciate it. Our next witness will be Congressman Ed Royce, who represents the 39th District of California, which includes the city of Fullerton. Congressman Royce has been a very active Member of Congress since his election in 1992. I'm proud to be in the same class of the Congress, Mr. Royce, and we're very thankful to have you here today.

STATEMENT OF HON. EDWARD R. ROYCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. ROYCE. Thank you, Chairman Canady. It's my privilege and pleasure to be here today.

Let me say to the members of the committee that I appreciate the opportunity to share with you some of my concerns and some of the concerns of my constituents here in southern California regarding the actions of the Civil Rights Division of the Department of Justice in enforcing group preferences and also on the ramifications for local agencies, such as the city of Fullerton.

On February 28, the mayor of our city of Fullerton, Julie Saw, wrote to me asking guidance and advice with respect to a matter involving the U.S. Department of Justice, and I ask that a copy of her letter be included in the record.

Mr. CANADY. Without objection, it will be.

[See appendix, p. 476.]

Mr. ROYCE. Mr. Chairman, in her letter, Mayor Saw advised me that the city of Fullerton 4 months previously that "received a communication that the department had concluded the city had not hired enough minority police officers and firefighters and threatened to undertake litigation unless the city entered into a consent decree."

Mayor Saw went on to say "The city in no way supports any form of discrimination and its hiring practices have always been based upon the most qualified candidate. While the city does not believe it has practiced any form of discrimination, defending itself in this matter could be very expensive. We were recently informed that the city of Torrance, in defending itself against a similar charge, has expended in excess of a million dollars in attorney fees. On the other hand, as you can see, the consent decree itself would also be expensive and actually requires the city to give candidates preference based upon their race or national origin."

"Among other things, the city is also concerned about being compared to Los Angeles County and about hiring additional administrative personnel when such may not actually be necessary."

Now, on March 10, in response to the mayor's request, I wrote to Attorney General Reno, noting that, to my knowledge, there had

been no complaints filed against the city of Fullerton by anyone, no one has alleged racial bias or discrimination in hiring, and asking her the basis for the Department's decision to select Fullerton for action and requesting internal and external data and memos and correspondence and other material related to the Department's decision.

On April 6, I received a letter from Deval Patrick, Assistant Attorney General, Civil Rights Division, signed by Kathryn Baldwin, stating "Your correspondence has been acknowledged as a request for information under the Freedom of Information Act and, accordingly, has been forwarded to the division's FOIA branch for response."

Subsequently, on April 14, I received by fax a letter from Mr. Kent Marcus, Acting Assistant Attorney General, stating that "I hope our earlier response categorizing your letter as a Freedom of Information Act request did not cause undue confusion. It is the longstanding policy of the Department of Justice not to comment on law enforcement investigations. However, please be assured that whenever we attempt to settle the case prior to litigation, any position taken by the United States is fully within the requirements of the law and would not include a demand for illegal preference hiring."

Mr. Marcus concluded that "When and if there is a resolution of any case against the city of Fullerton, we would be happy to share any relevant documents with you at that time."

Mr. Chairman, I don't mind telling you that I find the Department's action and response in this matter very distressing. Have we reverted to star chamber proceedings in this country, where a city can be accused by a department of the Federal Government, without apparent cause, of violating some arbitrary statistical standard and presented with a 77-point demand for corrective action? Is this a relic of the cultural revolution in Mao, China, where some are "selected for self-criticism and flagellation?"

Why can't the Acting Assistant Attorney General advise an elected representative in Congress of the charge against a city in the district he represents? Why can't he do that until after the case is resolved?

I believe the Department should be required to publicly state its case against the city of Fullerton and not arbitrarily cause the city and its taxpayers the expense of either defending itself in court or adopting expensive arbitrary and unnecessary remedies for some unproven misdeed.

Among the remedies demanded by the Department in its proposed consent decree are paid ads in non-English media outside the county, payment of back pay and benefits for minority applicants who sought jobs between 1985 and 1993 and weren't hired, but, most importantly, payment to minorities who did not apply—who did not apply because they thought it would be futile. I meant to go to that job interview, I just didn't go because I thought it would be futile.

What's more, the pool of applicants and the statistics used to set minority hiring quotas in the decree include a county in which the city of Fullerton is not located. It is not in Los Angeles County. It is in Orange County, CA.

Mr. Chairman, I am reminded of the plea by the late Reverend Dr. Martin Luther King that we should seek a society in which the Government is colorblind. It was true then, as it is today, that we should hire the best applicants, regardless of race or color. Setting quotas by race or color smacks of a philosophy in which one race is granted privileges at the expense of others.

The city of Fullerton, in the face of a severe budget crisis, is laying off workers, some 40 workers. Yet, under the Department's proposed consent decree, it would be required to hire two new people to administer an affirmative action program. Despite the fact that the city is in the process of cutting back its police force from 158 officers 3 years ago to 143 this year, 6 of the last 12 hires in the police and fire department have been minorities.

The city can't afford to spend a million dollars to defend itself against a baseless lawsuit and it can't afford to comply with all the demands of the consent decree. The overriding question, Mr. Chairman, is why did the Department of Justice select Fullerton for investigation and prosecution under the law. Was there a complaint filed? If so, no one has said so. City officials have repeatedly asked the Department officials this question and have been given no answer. There's never been a complaint filed, to the city's knowledge or to my knowledge.

Or was the city simply chosen on the basis of a theoretical demographic model or quota system? Was it a computer generated model? The Department wants the pool of job applicants to be "44.3 percent minority" within 5 years and it seems as though what the agency did was run a computer generated model in which they included Los Angeles County and came up with politically correct—with what would be politically correct numbers, which, it turns out, aren't even correct in this case.

Accordingly, Mr. Chairman, I request permission to submit the following questions to the Division and ask for a written response from the Department, and I will submit those questions to you at this time.

I thank you for the opportunity to testify here today.

[The prepared statement of Mr. Royce follows:]

PREPARED STATEMENT OF HON. EDWARD R. ROYCE, REPRESENTATIVE IN CONGRESS
FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman, members of the Committee -- I appreciate this opportunity to share with you some concerns of my constituents here in Southern California regarding the actions of the Civil Rights Division of the Department of Justice in enforcing group preferences - and the ramifications for local agencies.

On February 28 of this year, Mayor Julie Sa of the City of Fullerton, California, (a city in my Congressional district in Orange County) wrote to me seeking "guidance and advice with respect to a matter involving the United States Department of Justice." I ask that a copy of her letter be included in the record at this point...

Mr. Chairman, in her letter, Mayor Sa advised me that the City of Fullerton, four months previously, had "received a communication that the Department had concluded the City had not hired enough minority police officers and fire fighters, and threatened to undertake litigation unless the City entered into a consent decree."

Mayor Sa went on to say: "The City in no way supports any form of discrimination, and its hiring practices have always been based upon the most qualified candidate. While the City does not believe it has practiced any form of discrimination, defending itself in this matter could be very expensive. (We were recently informed that the City of Torrance, in defending itself against a similar charge, has expended in excess of a million dollars in attorney fees.) On the other hand, as you can see, the consent decree itself would also be expensive, and actually requires the City to give candidates preference based upon their race or national origin. Among other things, the City is also concerned about being compared to Los Angeles County, and about hiring additional administrative personnel when such may not actually be necessary."

On March 10, in response to the Mayor's request, I wrote to Attorney General Reno, noting that to my knowledge there have been no complaints against the City of Fullerton by any citizen alleging racial bias or discrimination in hiring, and asking her the basis for the Department's decision to select Fullerton for action, requesting all internal and external data, memos, correspondence and other materials relating to the Department's decision.

On April 6, I received a letter, dated April 3, from Deval L. Patrick, Assistant Attorney General, Civil Rights Division (signed by Katherine A. Baldwin, Chief, Employment Litigation Section), stating: "Your correspondence has been acknowledged as a request for information under the Freedom of Information Act ("FOIA") and accordingly has been forwarded to this Division's FOIA Branch for response."

Subsequently, on April 14, I received by FAX a letter dated April 13 from Mr. Kent Markus, Acting Assistant Attorney General, stating that: "I hope our earlier response, categorizing your letter as a Freedom of Information Act request, did not cause undue confusion...It is the longstanding policy of the Department of Justice not to comment on law enforcement investigations. However, please be assured that whenever we attempt to settle a

Royce Testimony - Page Two

case prior to litigation, any position taken by the United States is fully within the requirements of the law and would not include a demand for illegal "preference" hiring."

Mr. Markus concluded that: "When and if there is a resolution of any case against the City of Fullerton, we would be happy to share any relevant documents with you at that time."

Mr. Chairman, I don't mind telling you that I find the Department's action and response in this matter very distressing. Have we reverted to Star Chamber proceedings in this country, where a city can be accused by a Department of the Federal government -- without apparent cause -- of violating some arbitrary statistical standard, and presented with a 77-point demand for "corrective" action? Is this a relic of the Cultural Revolution in Mao's China, where some are "selected" for self-criticism and flagellation? Why can't the Acting Assistant Attorney General advise an elected Representative in Congress of the charge against a City in the District he represents...until after the case is resolved?

I believe the Department should be required to publicly state its case against the City of Fullerton, and not arbitrarily cause the City and its taxpayers the expense of either defending itself in court or adopting expensive, arbitrary and unnecessary remedies for some unproven misdeed. Among the remedies demanded by the Department in its proposed consent decree are paid ads in non-English media outside the County; payment of back pay and benefits for minority applicants who sought jobs between 1985 and 1993 and weren't hired; and even payment to minorities who did not apply because they thought it would be futile! What's more, the pool of applicants and the statistics used to set minority hiring quotas in the decree include a county in which the City of Fullerton is not located.

Mr. Chairman, I am reminded of the plea of the late Rev. Dr. Martin Luther King, Jr., that we should seek a society in which the government is colorblind. It was true then, as it is today, that we should hire the best applicants, regardless of race or color. Setting quotas by race or color smacks of a philosophy in which one race is granted privileges at the expense of others.

The City of Fullerton, in the face of a severe budget crisis, is laying off workers, yet under the Department's proposed consent decree it would be required to hire two new people to administer an affirmative action program. Despite the fact that the City is in the process of cutting back its police force from 158 officers three years ago to 143 this year, six of the last 12 hires in the police and fire departments have been minorities. The City can't afford to spend a million dollars to defend itself against a baseless lawsuit, and it can't afford to comply with all the demands of the consent decree.

The overriding question, Mr. Chairman, is why did the Department of Justice select Fullerton for investigation and prosecution under the law? Was there a complaint filed? If so, no one has said so -- City officials have repeatedly asked Department officials this question, and have been given no answer. Or was the City simply chosen on the basis of a theoretical demographic model, or quota system? (The Department wants the pool of job applicants to be "44.3 percent minority" within five years.)

Accordingly, Mr. Chairman, I request permission to submit the following questions to the Division and ask for a written response from the Department. Thank you.

Questions for Department of Justice:

1. What was the basis for the Department's investigation of the City of Pullerton, California? When was the investigation initiated?
2. How does the Department determine which cities to investigate?
3. If the Department uses statistics as a basis for initiating an investigation, how are factors such as applicant qualifications and interests weighed? What is the statistical model used?
4. To the extent the Department relies upon anonymous complaints, how does it verify the legitimacy of claims and allegations?
5. What type of findings are provided to the city following completion of an investigation before or at the time a consent decree is presented?
6. If no intentional discrimination is found but there is reason to believe a city could perform more effectively in recruiting minorities, what type of positive program is suggested by the Department — or does the Department simply rely upon intimidation [e.g. "We will sue you so you better sign a consent decree"]?
7. Who decides whether to proceed against an agency?
8. What is the Division's budget for litigation? What is the budget for development of model programs for correcting discrimination? Is any solution offered other than litigation or consent decrees?
9. How far back does the Department go in investigating and analyzing a public agency's employment practices? Is there a limit or statute of limitations on such matters?
10. What constitutes an "approved" written exam? Does the Department have any approved tests that a city could use for such occupations such as police officer or fire fighter that can provide a safe haven from DOJ challenge?
11. If a city has operated in good faith based upon a test that has been validated by psychological experts, is that acceptable, or must the city prove the validity of its tests? How does it do that?
12. Is there a point where common sense would dictate that the process is not cost-effective to DOJ or the city involved? Is any analysis done by the Department to determine the actual benefit to employees and employers of a particular course of action or demand, in order to insure the proper expenditure of public funds, federal and local?
13. Does the Department require cities to set goals for employment of minorities and then monitor them?
14. What equal treatment protection is afforded to potential non-minority applicants when a consent decree is in effect? Will non-minority applicants who possess equal or better qualifications be discriminated against? Doesn't this mean innocent non-minority applicants pay part of the price of a settlement?

15. What is the Department's past record regarding the temporal duration of consent decrees?
16. What does the Department record reflect regarding the number of individual claims for compensation under consent decrees in disparate impact cases vs. the actual number of claims approved?
17. In pursuing disparate impact claims in occupations requiring a high level of skills for entry, such as police and fire fighters, how does the Department determine the number of eligible claimants? Are general population statistics used, or "qualified" population statistics? If the latter, how is the body of qualified people defined? Does the Department have any programs to help people become qualified?
18. Why does the Department insist on court-ordered consent decrees as opposed to some other method of compliance assurance?

[See appendix, p. 472 for answers to the above questions.]

Mr. CANADY. Thank you, Mr. Royce. We appreciate your being here. You have pointed to some troubling circumstances, to say the least, and I want to assure you that this subcommittee does have jurisdiction for the oversight of the Civil Rights Division at the Department of Justice.

We will be conducting oversight hearings and we will inquire further into the circumstances which you have discussed. Thank you very much for being here.

Mr. ROYCE. Thank you, Mr. Chairman. Thank you, members.

Mr. CANADY. Are there questions? Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Chairman, I would just like to make a comment. We did have an oversight hearing scheduled the week before the recess and it was one of those days where we were voting every 20 minutes and we figured we couldn't get Mr. Patrick on hand for a long enough period of time all in one sitting to get these items on the table.

I would hope that the chairman, as soon as he gets back to Washington, would send a letter to Mr. Patrick, asking him to respond to the points that you have made and to have those responses with him when the oversight hearing is rescheduled, because I think we do want to get this on the record.

Mr. CANADY. Mr. Sensenbrenner, it would be my intention to do just that. Absolutely.

Mr. ROYCE. Thank you again, Mr. Chairman. Thank you, members.

Mr. CANADY. Our next witness is Mr. Larry Alexander. Mr. Alexander is a distinguished professor of law at the University of San Diego Law School.

STATEMENT OF LARRY ALEXANDER, PROFESSOR, UNIVERSITY OF SAN DIEGO LAW SCHOOL

Mr. ALEXANDER. Thank you, Mr. Chairman and members of the committee. I want to apologize in advance. I was contacted only yesterday, so I don't have a prepared set of remarks. I have some notes here that I haven't timed. So I'm sure you'll let me know if I'm running too long.

Mr. CANADY. When the light goes red, your time has expired, although we're not strictly enforcing the time.

Mr. ALEXANDER. And these remarks, I don't know how much sense they'll make, but if you have any questions, I would much appreciate getting them if there's anything that's unclear.

I am here to speak against racial preferences, racial preferences by any institution, and I'm including within that gender preferences. I'll use racial preferences mainly as a shorthand. I'm not here speaking as a victim, as an angry white male. I don't know that I've been personally victimized by any preference that's been given by an institution. I can say, however, that all of us, I believe, are victims of such a system, and I'm here speaking as a victim in that more general sense.

I'm not here as a Republican, because I'm not Republican. I'm not here either as a sort of Johnny-come-lately on this issue. I've been a long-time supporter of the 1964 Civil Rights Act as it was originally conceived and, as it was originally conceived, it forbade racial and similar kinds of preferences.

The 1964 Civil Rights Act, as everyone knows, forbids racial and gender discrimination. Preferences, whether they are rigid goals, quotas, goals or timetables—whatever they are called—are racial discrimination. You can not prefer one race without discriminating against another.

The supporters of repealing racial preferences and supporters of the California Civil Rights Initiative out here, including myself, include many liberals who marched in the South in the 1960's under the banner of nondiscrimination. We marched in support of judgment on the basis of content of character, not the color of skin, Martin Luther King's lines, and that's still what we're fighting for today.

Let me say some things about racial preferences as a remedy for discrimination, because sometimes they're attempted to be justified that way. Discrimination against individuals, on the basis of race is a wrong to them as individuals and any remedy should reflect that one is wronged as an individual. There are no proxy victims or proxy discriminators. And people who belong to the same race or gender are not fungible. One cannot be substituted in for another as a remedy for anything that happened to the former.

The remedy for wrongful racial discrimination should never be racial discrimination, which is what preferences are.

Now, let me go into some of the evils that I see in racial preferences, and this comes from observing these in operation for essentially a generation now. First, something that's little remarked on, but I think is one of the worst aspects of this, is that a system of racial preferences, especially when conducted by the State and local governments or by the Federal Government, requires legal definitions of race, but race is a scientifically empty concept.

We're all of one race—the human race. All distinctions among us are arbitrary scientifically. Scientists do not recognize race as a workable scientific category. All legal definitions will be arbitrary, and as soon as they're defined, intermarriage will essentially destabilize them. Humanity is one species with a continuum of distinctions, almost all of which are irrelevant to any legitimate concern.

Now, among the other ills of racial preference. The first is racial politics and racial balkanization. If someone is turned down based on the lack of talent for a particular job, presumably that person will invest in increasing his or her talent. If, however, one is turned down because of race or gender, a likely response will be investment in racial politics, seeking larger numbers for your particular group or separate status for your group.

If most of the Asian preferences go to Japanese and Chinese, then Filipinos and Pacific Islanders will wish to have a separate status. If most Hispanic preferences go to Cubans, then Mexican-Americans will seek to have a separate status. The balkanization will go on and on because that is what is rewarded.

If one is picked for a position in a school or in a job because of race rather than based on those characteristics that predict performance, then what we'll end up with is a racially identifiable group that is performing less well in the institution than others in the institution. And then the predictable responses to that will be, first, racial isolation. It is painful psychologically to be a member

of a racially identifiable group that is performing less well in an institution.

One way to seek to avoid the pain is to isolate oneself. What we end up with are institutions that purport to be integrated, but are actually not integrated at all. They are quite segregated. There are, if we're talking about college campuses, separate dormitories, separate student centers, separate tracks, separate majors, phony degrees.

And ultimately the place is pervaded not with a sense of what one can, as an individual accomplish, but with a victim mentality and race and racism as all-purpose crutches and excuses, and, most lamentable, a sense of hostility to the institutions and their standards.

Mr. CANADY. You can continue and conclude your remarks in a moment or two.

Mr. ALEXANDER. OK. The attack on the standards will be the worst aspect of this ultimately because the standards themselves are the means for people to advance and to accomplish things. Once they are attacked as racist, and once they are put aside in the service of diversifying the institution, there will be an irretrievable loss of value.

The last aspect of this that is an ill, is the dishonesty that it breeds and the hypocrisy. People will speak in euphemisms. Once the standards lead to disproportional racial impacts, the standards will be ditched and euphemisms will take over for the standards.

But there will be, also, hypocrisy. Proponents of preferences rarely seek anything but the most talented when it's their own money and their own lives that are at stake.

I'm sorry. I have a lot more to say, but I will acknowledge the limits.

[The prepared statement of Mr. Alexander follows:]

PREPARED STATEMENT OF LARRY ALEXANDER, PROFESSOR, UNIVERSITY OF SAN DIEGO
LAW SCHOOLCCRI**I. The CCRI Is An Antidiscrimination Act**

The CCRI forbids racial and gender discrimination, nothing more. Although the CCRI includes language forbidding racial and gender preferences as well as racial and gender discrimination, that language is logically redundant and superfluous. One cannot prefer one person on the basis of race or gender without dispre-
ferring -- discriminating against -- others on the same bases. I cannot give a preference to Tom over John because Tom is black without at the same time discriminating against John because he is not black. I cannot prefer Mary over Marvin because Mary is a woman without discriminating against Marvin because he is a man.

The CCRI then would have the same meaning if the language about preferences were dropped, in which case its remaining language would be essentially identical to the federal civil rights laws. Why then is the language forbidding preferences in the CCRI if it is redundant? The answer is that bureaucrats and courts have distorted the meaning of ordinary laws forbidding racial and gender discrimination and have read those laws to permit and sometimes to require racial and gender preferences. As I have said, racial and gender preferences are racial and gender discrimination. Therefore, what the bureaucrats and courts have done in effect is to convert laws forbidding racial and gender discrimination into laws permitting or requiring such discrimination, in contradiction to both the express language of

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those acts and the understanding of those who drafted and voted for those acts.

The CCRI's language forbidding preferences is, therefore, while logically unnecessary, a clear signal that such an inversion of meaning shall not occur: antidiscrimination shall mean antidiscrimination. Laws which were intended to mandate racial and gender blindness shall be read to mandate racial and gender blindness."

Thus, the CCRI is meant to appeal to those of us -- the vast majority of Californians and Americans of all colors and both genders, liberals as well as conservatives, Democrats as well as Republicans -- who supported and continue to support the ideals of racial and gender blindness that animated the 1964 Civil Rights Act and other civil rights laws. The supporters of the CCRI are the heirs to Martin Luther King, Jr.'s dream of a nation in which all are judged by the content of their character, not the color of their skin.

II. Racial and Gender Preferences Are Not Necessary as Remedies for Past Discrimination

Discrimination against individuals on the basis of their race or gender is a wrong to them as individuals, and any proper remedy for such discrimination must reflect that fact. Thus, a

* The CCRI outlaws racial and gender preferences regardless of whether they take the form of quotas, goals and timetables, one of several positive factors, and so forth. It is the use of race and gender at all, and not just the strength of those factors, that is objectionable.

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policy of racial and gender preferences -- racial and gender discrimination -- is never warranted as a remedy for wrongful discrimination. Such a policy focuses on racial and gender groups, not on individual victims of discrimination, and it treats individual members of such groups as if they were fungible. No individual victim of wrongful racial or gender discrimination is "compensated" by racial or gender discrimination in favor of a different individual regardless whether the latter is a member of the victim's racial or gender group. Such discrimination compounds the original wrong rather than annuls it.

III. Governmental Racial Preferences Require Arbitrary and Obnoxious Official Determinations of "Racial" Status

The CCRI applies only to government. When government pursues policies of preferring some races and discriminating against others, it must employ legal definitions of racial status to determine who gets preferred and who gets dispreferred. Thus, the Southern states during the era of Jim Crow, Nazi Germany, and Apartheid South Africa, each of which engaged in racial preferences, had elaborate racial codes for determining into which racial group individuals fell.

Race, however, is a scientifically discredited concept. All human beings belong to the same species, with continua of genotypical and phenotypical distinctions, almost all of which are irrelevant to any legitimate governmental concern. There are no nonarbitrary ways of dividing human beings up into "races," and

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the genotypical and phenotypical variety within any "race" and the genotypical and phenotypical overlap among "races" dwarf any genotypical and phenotypical differences between "races." Moreover, the fact that human beings are one species and can interbreed means that legal assignments of individuals to "races," on whatever arbitrary basis, will become unworkable as soon as individuals from different "races" have children. The CCRI outlaws those governmental policies that require these arbitrary, scientifically baseless, and obnoxious legal definitions of race."

IV. The Racial and Gender Preferences Outlawed by the CCRI Have Produced and Continue to Produce a Variety of Social Ills

- (1) Racial and Gender Preferences Lead to Racial Politics and Racial Balkanization as Alternatives to Development of Talents

If persons are turned down for a position in a school or a business because they are not as talented as their competitors, they may react by investing in developing their talents further, which development is both an individual and a social good. If, however, they are turned down because they are not in the preferred racial group, they are likely to invest in racial politics, seeking perhaps to get a greater preference for their group, or seeking perhaps a separate and preferred status for

" On the points in this section, I refer the reader to Kwane Anthony Appiah, In My Father's House (Oxford: Oxford University Press, 1992), Ch. 2 ("Illusions of Race"), and to James Lindgren, "Seeing Colors," 81 Texas Law Review 1059, 1084-85 (1993).

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their subgroup. If Blacks get a preference in admissions or jobs over Whites, Hispanics will seek to differentiate themselves from Whites and demand a preference as well. If the bulk of Hispanics who benefit from preferences are Cuban, Chicanos will seek to divide the group "Hispanics" into subgroups, each with its own set of preferences and target shares of places in the schools and in the workforce. Filipinos will want to be treated as a separate group rather than as part of the group "Asians" if a "disproportionate" share of those favored by an "Asian" preference are Japanese or Chinese. And so on.

The results of such a process, which process is not a fanciful prediction but a fact we can observe all around us, are socially deleterious. Ethnic groups are pitted against one another, and effort is invested in racial politics rather than in individual development of talent. And unlike individual development of talent, which benefits society, racial political rent-seeking, like all political rent-seeking, reduces social wealth.

(2) Racial and Gender Preferences Undermine Socially Beneficial Standards

When people are preferred for competitive positions, not because they are thought to be the most talented for those positions, but because of their race or gender, then we should expect that they will not perform as well as in those positions as those chosen on the basis solely of talent. If they do not perform as well as the most talented, two principal consequences will re-

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sult. Most obviously, society will pay the price of having less talented students and workers than it could have gotten. Of perhaps greater long-term concern, groups that are racially or socially identifiable and who are performing less well than others will employ various socially destructive defense mechanisms to cope with the psychologically painful reality of below-average performance. What has occurred as a result of preferential admissions to competitive universities illustrates this point, which applies as well to preferences in the workforce.

First, the identifiable group of below-average performers will seek isolation from other groups. It is psychologically easier to cope with below-average performance if one avoids contact with those performing better. This is an increasingly widespread effect of racial preferences in university admissions. Those preferred end up living and socializing only with each other, take courses on separate tracks and in separate departments from others, and end up with grades and degrees that are viewed by the outside world as essentially phony.

Second, the group will foster the idea that it is a victim and that it is oppressed by others. Such a victim mentality will be socially destructive. It will generate hostility towards others and a sense of helplessness and dependence within the group itself. Race and racism or gender and sexism will become all-purpose excuses for individual failure. And solidarity within the group will become extremely important: the members of

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the group who make friends across group lines, perform well in non-group-approved subjects, and so forth, threaten the picture of the world that the group psychologically requires.

Third, and perhaps most destructive of all, the group will attack as illegitimate -- racist and sexist -- the prevailing standards according to which their performance is below average. This will in turn generate pressure to change the standards so that the groups performing below average will no longer do so, not because they have improved but because the standards that define improvement have been altered. Eventually, what began as a preferential program will be redescribed as one that is nonpreferential. The old standards, which required the use of preferences because they disproportionately affected racial and gender groups, are now seen as illegitimate; for legitimate standards would not produce such a disproportionate result. In fact, truly legitimate standards would treat racial and gender proportional representation as, or perhaps more important than, any other "talent." No group can be disproportionately more qualified than any other group, and any measurement of qualification that produces results at odds with this axiom must be invalid.

Again, this phenomenon is not a paranoid prediction. It is the current reality on many university campuses and in some sectors of the workforce. And when standards of performance that accurately measure socially valuable talents succumb to the forces of racial and gender politics, everyone ultimately loses.

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Indeed, the biggest losers will be those who face the greatest social disadvantages. For when standards of performance are altered for reasons of social and gender politics, those who need to develop their productive talents as their means to escape poverty will be deprived of their means of doing so. Bogus standards help no one and ultimately fool no one.

(3) The Attack on Standards Will Invite Socially Destructive Group Comparisons

The attack on standards has as its concomitant the assumption, stated or unstated, that but for the racism and sexism inherent in the prevailing standards, all racial and gender groups would be proportionately represented in all areas of life. This assumption, since it focuses on comparisons of groups (and claims equality of all talents), invites contrary group comparisons, such as those recently made by the authors of The Bell curve. If individuals, not racial or gender groups, are the focus of social policy, as they should be, the claims of The Bell Curve, whether correct or incorrect, would be irrelevant to social policy. No individual is either more or less talented just because some arbitrarily defined group to which he is assigned is on average more or less talented than other such groups. The claim of "but for racism and sexism, proportional representation" leads to destructive racial and gender politics and obnoxious racial and gender comparisons.

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(4) Preferences Lead to Dishonesty in Rhetoric and Hypocrisy in Action

The dishonesty stems from the quite proper human desire not to make others feel bad. Since most people admitted to schools or hired for jobs want to believe that their work measures up to that of others, there will be constant pressure on everyone to affirm that fact. Because preferences lead to disparities in performance along racial and gender lines, the pressure to affirm everyone's equal ability and contribution will usher in a pervasively dishonest form of discourse.

Hypocrisy is also a product of preferences. Those who propose preferences rarely seek anything but getting the most talented when their own money or well-being is at stake. No one seeks a racially balanced surgery team for a brain tumor operation; she seeks only the best surgery team. And this example holds for all endeavors in which people have a great personal stake.

(5) Preferences Have Deflected and Will Continue to Deflect Attention from Real Social Problems and Solutions

Finally, racial and gender preferences, and the jeremiads against the prevailing standards as racist and sexist, deflect attention from real social problems and real solutions. They cause us to overlook the fact that many groups have overcome great social handicaps and became quite successful without preferences, and that those groups' histories could hold the key to other groups' hopes. And the preferences and accompanying uses

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of racism and sexism blind us to the fact that illegitimacy rates, drugs, gangs and crime, and virulent anti-intellectualism are vastly more important to group welfare than racism and sexism.

V. The Celebration of the Great Diversity of American Society Does Not Warrant and Is Antithetical to Racial and Gender Preferences

We should all be grateful for the social wealth represented by America's multicultural and multiethnic society. The variety of groups in this country gives individuals so many opportunities, so many ways of being, that it results in enormous variety, creativity, and personal freedom. Officially mandated racial and gender preferences, however, pervert what is good about our diversity and arbitrarily assign an official status to persons. No longer are these persons individuals who are free to identify with and draw from whatever group and tradition they prefer, and who are shaped by an almost infinite number of different influences to make them the unique individuals they are. Now they are tokens of arbitrarily, clumsily, and rigidly governmentally-designated groups. Indeed, preferences tend to carry with them notions of orthodoxy and group-think. They are the antithesis of what we should celebrate when we celebrate diversity.

The CCRI is necessary to unleash the real positive power of diversity.

Mr. CANADY. Professor, we appreciate your being here today. Earlier in your remarks, you touched on the 1964 Civil Rights Act. I think this is a point that bears repeating.

It is my view that the whole system of preferences based on race and gender, that we have seen adopted in this country, are directly at variance not only with the spirit of the 1964 Civil Rights Act, but with its letter.

Would you care to further comment on that subject?

Mr. ALEXANDER. Well, I think that's absolutely correct. This is a matter—not particularly a matter of policy, it's a matter of strict logic. One cannot discriminate in favor of someone on the basis of race without discriminating against everyone else on the basis of race.

The 1964 Civil Rights Act outlaws this. It was made clear in the floor remarks—Senator Humphrey couldn't have been clearer in his remarks in response to questions about racial preferences—that these were condemned no matter in whose favor the discrimination occurred. These were outlawed by the 1964 Civil Rights Act. So I think it was clear enough in the original act.

Mr. CANADY. Now, lately we're hearing about and we have seen proposals to not have quotas or even perhaps goals and timetables, but simply to allow race to be considered as one factor. Actually, that's been something that's been embodied in the law in the *Bakke* decision.

What is your reaction to that? I have a little difficulty understanding their approach because it seems to me that either race will be a decisive factor or it will not be a decisive factor. And if it's a decisive factor, then the discrimination takes place. If it's not decisive, then it's meaningless.

So what would you say about the approach of allowing consideration of race as one of many factors?

Mr. ALEXANDER. Well, I think that there are two responses. First, I agree with you that whenever race is made a factor, then it becomes potentially decisive in any circumstance in which it is used. And if it is decisive, then it is a case of discrimination on the basis of race. Two people who are otherwise equal are treated differently because one of them is a member of a preferred race, one is not.

Moreover, as I've watched these things operate in various institutions over the years, if people's desire is to get certain proportions of race and they're told, well, you can only use race as a factor, it will turn out to be a factor of overwhelming importance in the decision. It will tend to swamp any other factors that are being used. So that what you will get is the equivalent of what you had before.

Mr. CANADY. Thank you very much. Are there questions from other members? Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you, Mr. Chairman. Professor Alexander, have you encountered any experience with racial norming of exam scores at your university or your law school?

Mr. ALEXANDER. No. Our law school—and I'm only familiar with the grading system in the law school—has not engaged in racial norming. One of the consequences of racial consciousness in admissions, which we do have, is that it tends to affect, even without racial norming of the grading, affect the overall stringency of the

standards, because if you maintain, let's say, a failure rate of 5 or 10 percent and the people you're admitting at the bottom, in terms of predicted performance, tend to be members of racial minorities and it turns out that the predictors are accurate, what will happen is that most of the people who are flunking out will tend to be the very racial minorities you admitted.

That will, in turn, generate pressure not to flunk out people. So that the standards get lowered because the consequences will be so racially obvious. And I do think that has happened. I do think that what has happened is that it has become very difficult to flunk.

Mr. SENSENBRENNER. Of course, with law school, the great leveler is the bar exam.

Mr. ALEXANDER. That's right. And, of course, there have been various movements in the bar exam to try to produce more proportional passage rates. The bar examiners went to a change which they thought would increase the bar passage rate of minorities, the latest one being, in California, the performance section of the California bar exam.

It turned out not to be. It turned out not to change the racial profile of those who passed it and those who failed. But it was instituted very much for that reason.

Mr. SENSENBRENNER. Thank you very much.

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. Good morning. I'd like to explore a simple question, which I alluded to in my opening statement and I'd like to hear your view on it.

The city of Chicago recently had an examination for promotion to police lieutenant. The city of Chicago has been wrestling with this problem, trying to be fair to the purported goal of affirmative action, and that is to level the playing field and bring those who would otherwise be broadly disadvantaged forward.

At another hearing I asked the question because it was topical at the time. I didn't receive satisfactory answers to it then, but perhaps some of your learning can give us a broader view.

The facts are as follows. Earlier this year 80-some slots were opened. The bottom 18, or approximately 20 percent were dropped off the test lists and there was a long and broad criteria for these promotions and then they were ranked accordingly. Some had finished first with all the criteria, and second and third and fourth and so on down the list, for the literally hundreds of applicants.

But the available slots, the bottom 18, were cut off the tests and other criteria are thrown out and the hirings were made 5 white, 5 African-American, 3 Hispanic, the racial mix of Chicago.

To me, that smells like a quota. The law is a little more stringent in how it views a quota and that says a quota is only a quota if it's announced before it's used and then applied afterward. Because it wasn't announced before it was used, it's not a quota, but, if it looks like a duck, smells like a duck, talks like a duck, then it's a duck.

And I'm not asking whether or not this is a quota. It's my belief that it is, whether it was announced or not. But is this common or regular in trying to accomplish the goals of affirmative action while not have a "quota" to go through these bizarre machinations to be able to get to the desired end and to avoid a lawsuit against

the city of Chicago by a well-meaning group or maybe even a non-well-meaning group?

Mr. ALEXANDER. Yes. I think this is a common—the gerryrigging of standards to produce racial outcomes is a pervasive practice. It goes on to different degrees in different institutions and it depends, to some extent, how manipulable things are.

I'm most familiar with university processes, both hiring of faculty and student admissions, and one of the things that occurs is that in areas where people really do believe in the standards, there is very little of it that goes on. There are no clamors to drop the Ph.D. requirement for hiring people in physics departments, because people understand the sort of hard-edged nature of what being a physicist is and what it requires.

I've never seen anybody demand a racial diversity on their neurosurgery team if they're going to have a brain operation. It's in areas where the standards are a little softer that people feel they can play, and especially when they themselves are not personally affected, when it's not their secretary that's being hired under the civil service exam, but somebody else's.

Then the standards become—where the standards are softer, there is more play, there is more of a feeling that you can count race as a plus factor, and so you see much more gerryrigging in those areas than you do elsewhere. In the law school, when it came time when we had to hire a senior tax professor, everyone thought, well, you don't really need to worry about how much affirmative action you're doing for a tax professor because taxes—you know, it's one of those areas where to talk about what would be a diverse point of view or something similar didn't seem to make much sense.

So there are distinctions within the area. As far as I'm concerned, it has all been poisonous. It has poisoned the dialog. It has poisoned just about everything in the institution.

Mr. FLANAGAN. Let me ask you. In your opinion, perhaps in the university setting, is it possible that because of affirmative action and its goal of obtaining diversity as an overriding goal, is it possible, even likely that unqualified people have been placed in qualified positions over the years in public service?

Mr. ALEXANDER. Well, you—

Mr. FLANAGAN. Then, again, how dangerous is that when they become tenured?

Mr. ALEXANDER. You will hear this mooted quite a bit. It is often said in hiring that we're not hiring unqualified people, we're just—you know, we're not taking the traditional qualifications quite as far as we otherwise could. Everyone who meets a threshold of qualification—

Mr. FLANAGAN. So you have a floor, but you don't perhaps have the best floor.

Mr. ALEXANDER. Yes. The truth of the matter is, though, that every human being who gets hired wants to be thought of as being competitive basically under the prevailing norms. They don't want to come in as the best black we could have hired or the best Chicano we could have hired. They want to be good by the prevailing norms, which is what leads to the erosion of honesty and dialog because we do, in fact—and the truth of the matter is if they were

hired taking their race or gender into account, then they weren't the best person we could have hired.

We've had some who we thought actually could do better by way of the prevailing norms, but we didn't take that person. Now, what tends to happen in this dialog is that you get a new—what tends to happen is diversity is then asserted as a qualification in itself. Diversity is a good thing. We want to have diversity. It becomes the qualification that substitutes for the otherwise failure to be the best at whatever the prevailing standards are.

And I stand second to none in celebrating the fact that this is a diverse society, where people have come from all over the world and have all sorts of different skin tones and backgrounds. I think that's the wonderful thing about the country, and I think we should all celebrate it.

Racial preferences arbitrarily assign individuals who are individuals with diverse influences in their backgrounds and make them into tokens of arbitrarily defined groups. And it is a perversion, in my mind, of the idea of diversity.

We have racial minorities on our faculty. They are nice, middle-class folks like the rest of us, who have gone through the same educational institutions, and the differences that they bring to bear based on their ethnic backgrounds are minuscule relative to the similarities they have to the rest of us. And that's neither good nor bad. It's just the fact.

Most of the preferences tend to be preferences that benefit relatively middle-class folks, don't do very much at all for under-class folks, and they deflect attention away from the real problems. They make racism into the all-purpose villain behind everything as opposed to the real problems that people face which dwarf racism as a problem. I don't know how many unqualified people get hired.

Mr. FLANAGAN. I don't suggest that there are any. I'm merely asking if it's possible.

Mr. ALEXANDER. But if I'm going in for surgery, I want the best qualified person. I don't want someone who was qualified relative to some dismal standard, but is just not the best.

Mr. FLANAGAN. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Flanagan. Professor, we appreciate your being here today. Thank you for your valuable testimony.

Our next witness is Sister Sally Furay. Sister Sally Furay is vice president, provost, University of San Diego. She is also an adjunct professor of law and has taught a course on sex discrimination and the law at USD's School of Law for 18 years. Sister Furay, would you come to the microphone? Appreciate your taking the time to be here to testify today.

STATEMENT OF SISTER SALLY FURAY, PROVOST, UNIVERSITY OF SAN DIEGO

Ms. FURAY. Thank you, Mr. Chairman. Good morning, everybody. I'm pleased to be here today to highlight my perspectives on affirmative action. And you haven't heard anybody, neither anybody on the panel nor anybody who has spoken yet, who speaks to the perspectives that I'm going to speak to.

And I might add that so far I'm the only person who has spoken who is not a white male. I'm going to focus my remarks on——

Mr. CANADY. Let me point out that we invited all the members of the subcommittee to be at this hearing and we have a very diverse subcommittee. I just want to point that out. Some of them obviously could not be here because of other commitments, but I think that's important to understand. This is an official meeting of the subcommittee to which all the members were invited from this perspective.

And I believe that we have a balanced panel of witnesses. We worked very closely with the minority in developing the witnesses for the panel. We appreciate your taking the time to be here.

Ms. FURAY. Thank you. I appreciate your comments. I am going to focus my remarks on employment issues relative to women and minorities. But I'd like to note briefly that civil rights laws grant many preferences that are not based on race and gender and which do not seem to be included in the current attacks on affirmative action, though they could well be affected by it.

There are a number of examples and I'll just touch upon three. Laws giving preference to employment to veterans originated in the last century and have been upheld by the courts, and, of course, we all know who those veterans were. The law requires all of us who are employers to make affirmative provisions, and very expensive ones, for the disabled, whether in accessibility of facilities or in employment issues.

And the Office of Civil Rights Regulations suggests that a recipient of Federal funds may take affirmative action to overcome situations which led to limited participation on the basis of age.

That's just an aside of what does not seem to be involved in this affirmative action discussion, although all of those things are affirmative action.

The background of affirmative action in the United States is crystal clear. It was developed because of pervasive, long-term, societally accepted discrimination in this country, close to two centuries by the time that the Civil Rights Act was passed. It has continued because ingrained prejudice remains alive and well in our society.

When I was growing up in the Midwestern part of the United States, newspapers in my home city, and I thought nothing of it, I just accepted it, routinely advertised jobs as men wanted and women wanted and I knew what I couldn't apply for. We all knew, in my native city of Omaha, which had then and still has, a sizeable black population, that blacks and Hispanics, if they wanted a job, were hired into segregated jobs. So were women. There were certain things you could be. And the practices were accepted and the attitudes were generally accepted.

I, for one, never questioned them, growing up. That's just the way the world was. And, of course, there were preferences going on all the time for everybody who wasn't a white male. Not everybody. Most people.

When the Civil Rights Act became effective in—the Civil Rights Act of 1964, which became effective in 1965, the attitudes didn't disappear. The discrimination became more subtle. And I'm sure you've all read the long line of cases beginning in the appellate courts and then going to the Supreme Court in the late 1960's and throughout the 1970's that exposed some of those subtleties.

The literature of psychology, sociology, and law is replete with research on which comes first, changes in societal practice or changes in people's attitudes, and the general conclusion from that literature is the change stems sometimes from one, sometimes from the other, usually from both.

Affirmative action endeavors to bring about societal change in the hope that attitudinal change will follow. Such change takes several generations. As a country, we are more aware of the problem and we have improved, but we still have a long road ahead, which is why affirmative action, properly understood, is still needed.

In order to talk about affirmative action, one needs to know what it is and what it is not. I grant that it has been badly abused. I am appalled, though, by the shrill and mindless rhetoric being bandied about in newspapers, especially here in California, on talk shows and in politically motivated speeches about the meaning of affirmative action.

Unfortunately, the current debate has taken off without any attempt to define the basic phrase. It's obvious that the term means different things to different people, making clarity impossible, and there's a lot of anecdotal information that has made its way into this debate.

I would, therefore, like to look first at what affirmative action does not mean, since there are so many myths about its meaning. It does not mean hiring the unqualified. It does not mean a prohibition on hiring highly qualified candidates who are not female or members of a minority group. It does not require quotas, as distinct from goals and timetables, unless they are imposed by court order.

It is not advocated as a basic principle of justice and as a permanent program, but rather as a principle of remedial justice and as a temporary measure to be phased out when equality of opportunity is realized in society.

What, then, does it mean? I like to define it as opening the doors of opportunity and, as someone has preceded me in saying, as leveling the playing field, as it were.

Mr. CANADY. Please continue. If you could conclude your remarks in another 2 or 3 minutes, though.

Ms. FURAY. Yes, I can. In a perfect world, unless there is a bona fide occupational qualification for a particular job, employers would pay no attention to an applicant's race, gender, religion, country of origin, et cetera, it just wouldn't matter, but would look only to qualification for the job.

But this is not a perfect world. We all know that prior to the Civil Rights Act of 1964, the vast majority of higher paying and professional jobs were held by white males, who were and are less than half of the U.S. population. To a lesser extent, this is still true.

Leveling the playing field means to me ameliorating the job monopoly. How? By taking positive steps to ensure a strong pool of qualified and diverse applicants from which to choose qualified persons for jobs. Does this mean that white males should no longer hold the vast majority of higher paying and professional jobs? Absolutely. Does it mean that white males should not be hired because

there is a race-gender quota? Absolutely not, again, short of a court order.

I realize that goals and timetables are sometimes turned into quotas and I find this wrong and so do the courts, short of one of their own orders that has to be obeyed. Goals and timetables are not quotas. Business uses them for every aspect of operation. There are goals and timetables for productivity, for profits, for capital investments, for marketing strategies, for product research and implementation, and for all other aspects of strategic planning.

It is logical to use such goals and timetables, as well, for personnel planning, including fostering diversity in the work force.

What about preferences in affirmative action? If preference means the hiring of unqualified or less qualified employees, such a practice is detrimental to the concept of affirmative action. If it means deciding between approximately equally qualified applicants in a job category and using race or gender as a plus factor, such a practice is appropriate, whether it means hiring a white male in a nursing job, because white males are underrepresented there, or hiring a female, because women are underrepresented.

The real key is how qualified is defined and what Professor Alexander called the traditional views of the best. We all know what happened to those until the Civil Rights Act of 1964. Traditional views of the best have not freed themselves of the best being a white male.

But if I, as a white female, subconsciously hire people only just like me, then the subtle discrimination is going to continue. So the means to the goal, in my opinion, is to neutralize the subtle individual or institutional discrimination against groups historically and currently denied equal opportunity. And because I believe that that is the means, I think the United States needs to continue this neutralization process through the use of affirmative action properly defined.

What I do disagree with is Government pressure to make things happen too fast. I'm an educator and I know that if you're hiring the tax expert, it's obvious that neither Professor Alexander nor I are speaking for the University of San Diego, we're speaking opposites, you're hiring that tax professor, you want a senior expert. The women and minorities aren't there yet. The person hired has 30 to 35 years of experience in this field. These things take time and the Federal and the State government and the municipalities, as well, have probably been trying to push it too fast, until we get more people educated and moving into this.

But that neutralization of the subtle or institutional discrimination still needs to go on. Thank you very much.

[The prepared statement of Ms. Furay follows:]

PREPARED STATEMENT OF SISTER SALLY FURAY, PROVOST,
UNIVERSITY OF SAN DIEGO

Good morning. I am pleased to be here today to highlight my perspectives on affirmative action. Although I will focus my remarks on employment issues relative to women and minorities, I would like to note briefly that civil rights laws grant many preferences that are not based on race and gender, and which do not seem to be included in the current attacks on affirmative action, though they may be affected by it. There are a number of examples: laws giving preference in employment to veterans originated in the last century and have been upheld by the courts; the law requires all of us who are employers to make affirmative provisions for the disabled, whether in accessibility of facilities or in employment issues; Office of Civil Rights regulations suggest that a recipient of federal funds may take affirmative action to overcome situations which led to limited participation on the basis of age.

The background of affirmative action in the United States is crystal clear: it was developed because of pervasive, long-term, societally-accepted discrimination in America, and it has continued because ingrained prejudice remains alive and well in our society. When I was growing up in the midwest, newspapers in my home city routinely advertised jobs as "Men Wanted" and "Women Wanted." We all knew that blacks and Hispanics were mostly hired into segregated jobs. These were accepted practices based on generally accepted attitudes.

When the Civil Rights Act of 1964 became effective in 1965, the attitudes did not disappear, and the discrimination became more subtle. The literature of psychology, sociology, and law is replete with research on which comes first, changes in societal practice or changes in people's attitudes. The general conclusion is that change stems sometimes from one, sometimes from the other, usually from both. Affirmative action endeavors to bring about societal change in the hope that attitudinal change will follow. Such change takes several generations. As a country we are more aware of the problem, and we have improved, but we still have a long road ahead - which is why affirmative action, properly understood, is still needed.

In order to talk about affirmative action, one needs to know what it is and what it is not. I am appalled by the shrill and mindless rhetoric being bandied about in newspapers, on talk shows, and in politically-motivated speeches about the meaning of affirmative action. Unfortunately, the current debate has taken off without any attempt to define the basic phrase. It is obvious that the term means different things to different people, making clarity impossible.

I would therefore like to look first at what affirmative action does **not** mean, since there are so many myths about its meaning. It does **not** mean hiring the unqualified. It does **not** mean a prohibition on hiring highly qualified candidates who are not female or members of a minority group. It does **not** require quotas, as distinct from goals and timetables, unless they are imposed

by court order. It is not advocated as a basic principle of justice and as a permanent program, but rather as a principle of remedial justice and as a temporary measure to be phased out when equality of opportunity is realized in society.

What, then, does it mean? I like to define it as opening the doors of opportunity, "leveling the playing field," as it were. In a perfect world, unless there is a bona fide occupational qualification for a particular job, employers would pay no attention to an applicant's race, gender, religion, country of origin, etc., but would look only to qualifications for the job in question. But this is not a perfect world. We all know that prior to the Civil Rights Act of 1964, the vast majority of higher paying and professional jobs were held by white males, who were and are less than half of the United States population. To a lesser extent, this is still true.

"Leveling the playing field" means to me ameliorating that job monopoly. How? By taking positive steps to ensure a strong pool of qualified and diverse applicants from which to choose qualified persons for jobs. Does this mean that white males should no longer hold the vast majority of higher paying and professional jobs? Absolutely. Does it mean that white males should not be hired because there is a race/gender quota? Absolutely not (unless there is a court order to the contrary, and such court orders are given only against employers who have engaged in persistent and invidious discrimination).

I realize that "goals and timetables" are sometimes turned into quotas. I find this wrong, and so do the courts (short of a court order which must be obeyed). Goals and timetables are not quotas. Business uses them for every aspect of operation: there are goals and timetables for productivity, for profits, for capital investments, for marketing strategies, for product research and implementation, and for all other aspects of strategic planning. It is logical to use such goals and timetables as well for personnel planning, including fostering diversity in the work force.

What about preferences in affirmative action? If preference means the hiring of unqualified or less qualified employees, such a practice is detrimental to the concept of affirmative action. If it means deciding between approximately equally qualified applicants in a job category and using race or gender as a "plus" factor, such a practice is appropriate, whether it means hiring a white male in a nursing job because white males are underrepresented in the nursing group, or hiring a female because women are underrepresented in the employment group. The real key is how "qualified" is defined. If it means I subconsciously only hire people "just like me," subtle discrimination will continue, in violation of federal prohibitions against discrimination in employment.

The federal government defines affirmative action as "actions appropriate to overcome the effects of past or present practices, policies or other barriers to equal opportunity." Note the words "equal opportunity." Professor Roy Brooks, a civil rights scholar at the University of San Diego School of Law, emphasizes that affirmative action "has as its goal 'equal opportunity,' not equal results." The means to that goal? ... "neutralizing subtle individual or institutional discrimination against groups historically and currently denied equal opportunity." The United States needs to continue this neutralization process through the use of affirmative action, properly defined.

Mr. CANADY. Thank you for your testimony. We appreciate your being here today. Let me ask you. Do you think there is no difference between the preferences granted to veterans and the preferences that are based on race or gender?

Ms. FURAY. Preferences——

Mr. CANADY. You talked about——

Ms. FURAY. No. Preferences are preferences.

Mr. CANADY. OK. So you would think there is no moral difference or no substantive difference between preferences based on a biological factor and preferences based on a particular course of service that an individual undertook.

Ms. FURAY. Well, obviously, yes. There is a difference in the basis.

Mr. CANADY. But you don't think that that's a significant difference.

Ms. FURAY. I don't think, the way it's been used, there's a significant difference, Mr. Chairman. I've been quite a student of the veterans preferences, which, incidentally, if they're used in a limited way, I applaud. It's when they're lifetime preferences that I think they have been problematic. And in some States, they are.

Mr. CANADY. Let me just give you my perspective on that. I see veterans preferences as preferences based on services rendered to the country and I think that's very different than a preference which is based on a biological characteristic.

Now, for those who cannot see that there is a moral difference between that, between this source of preferences, I'm mystified by the failure to understand those differences, quite frankly.

Ms. FURAY. But you may need to distinguish, Mr. Chairman, between the theoretical approach—obviously, they are different—and the way it's been used. And it has been used to continue preferences for white males, particularly over females.

Mr. CANADY. So you believe that the preferences for veterans are intended to have a discriminatory impact based on race or gender?

Ms. FURAY. No, I do not believe that was the intent. In fact, I think it's pretty clear that they started in the last century and I think it's pretty clear that——

Mr. CANADY. You just believe that's been their impact.

Ms. FURAY. That's been their impact, and that can be documented.

Mr. CANADY. Let me ask you this. You heard the testimony earlier about some problems with affirmative action and you also stated that you believe, and correct me if I don't quote you correctly, that affirmative action had been badly abused.

Ms. FURAY. Yes.

Mr. CANADY. At least in some circumstances.

Ms. FURAY. I do. I said that and I believe that.

Mr. CANADY. In your testimony, you talked about some circumstances involving the use of goals and timetables which end up operating like quotas. I understand that you would believe that would be an abuse.

Ms. FURAY. That's correct.

Mr. CANADY. If a goal and timetable system is turned into a quota system, that would be an abuse, in your opinion. What other abuses do you see under the general heading of affirmative action?

Ms. FURAY. Well, you mean other than——

Mr. CANADY. Is that the only one? Is that the only one, that a goal and a timetable is allowed to operate as a quota? Is that the only abuse you see in these programs?

Ms. FURAY. No. I believe I referred to another one, which is a time element. I see it as abusive because it leads to abuse if you say you have to do this by such-and-such a time. The governments have done that, State, Federal, or local, of course they've done that.

Mr. CANADY. What sort of actions are you talking about that would be required by such-and-such a time? This hiring of individuals——

Ms. FURAY. Yes. Hire——

Mr. CANADY [continuing]. Within a certain racial or ethnic category or——

Ms. FURAY. By next year.

Mr. CANADY [continuing]. Admission of students in a certain category? I think that's the same——

Ms. FURAY. Say do this within a year or two, and it doesn't work that way. When you have to educate people or train people to be qualified for things, that takes time.

Mr. CANADY. Well, isn't that a quota? What you're saying is—we're just going back. I think it's the same point.

Ms. FURAY. Well, if it is, I oppose it.

Mr. CANADY. But I think that's the same point you made that you're opposed to quotas. I don't see how that's different. So are there any other things that you're opposed to that fall under the general heading of affirmative action?

Ms. FURAY. Well, that depends on your meaning of affirmative action.

Mr. CANADY. Well, under the term as it is——

Ms. FURAY. I think the Federal Government——

Mr. CANADY [continuing]. Used or abused or as it is generally understood. And this is just a—and I've been wondering if there is anything.

Ms. FURAY. Yes.

Mr. CANADY. And there may not be anything. I think you highlighted one particular area of abuse that is of great concern, both to those who are opposed to racial and gender preferences and those who would say they're not.

Ms. FURAY. To me, turning things into quotas is throwing out the baby with the bath water.

Mr. CANADY. Let me move on to another point.

Ms. FURAY. Yes.

Mr. CANADY. In the testimony that was given before your testimony, references were made to some of the harmful impacts of affirmative action. Now, I'm talking about abuses of affirmative action, but, specifically, the harmful impacts of racial and gender preferences.

Do you think that even those aspects of the current system with which you agree do have any harmful impacts, do you think there's—and I'm not saying, on balance, whether it's good or bad. I understand—I think I understand very clearly that on balance, at least, you believe that this is a good system. It is a system that is helping to redress wrongs that have existed in our society.

But do you see that there are any negative aspects or any negative consequences of the employment of racial or gender preferences?

Ms. FURAY. Yes, and I think they're inevitable.

Mr. CANADY. What do you think those are?

Ms. FURAY. I go back to what I said about the overall societal issue is to change attitudes. You don't do that all at once. When you are trying to change attitudes, you will have lots of people around who say I have my job because I'm a female or somebody is not qualified or this African-American that was admitted to the University of San Diego and that whoever is saying it doesn't know he had a 3.9 grade point average out of high school and is saying, well, he's just in because he's black.

When you are in a societal process where attitudes are in the developing stage of change, everybody isn't on the same part of the spectrum. So there will be people who simply will always say that, and there's nothing you can do about it.

And I think that the people—that the qualified women, the qualified males in nursing—we have a nursing school. So I have seen how it operates in reverse, where males are the minority and not totally accepted in that profession. But the qualified people know who they are, what their assets are, what their talents are, and they say I know that's not true. It will be said. It's inevitable in societal change, any kind of societal change.

Mr. CANADY. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. I'd like to make a couple of points and then ask you a question, Sister.

First, let me say that I also disagree with your analysis on veterans' preference. And the reason for that is that the veterans gave several years of their lives to their country at the time their country needed them. And I think that the veterans' preference that is given is somewhat in compensation, can't be complete compensation, but somewhat compensation for the fact that some of the most productive years of their lives were spent defending the United States at a time when the United States was being attacked.

Secondly, I served on the subcommittee for most of the time since I was sworn into Congress in 1979, and my service on the subcommittee is considerably longer than the two young pup colleagues who are seated over to my right.

My observation on how this whole issue has developed has been that there was nothing wrong, per se, with the Civil Rights Act of 1964. However, anytime there was a court decision that certain political groups disagreed with, they came in with legislation that upped the ante, that made the rules different than they were in 1964.

And I'm referring specifically to the so-called Grove City bill that was passed over President Reagan's veto in 1988 and the Civil Rights Act of 1991, which passed after about 3 years of rather heated debate and, in my opinion, unfortunately, was signed by President Bush.

Now, both of those laws changed the rules because the Supreme Court, which is the ultimate umpire, ruled against certain political groups that were pushing the goals and timetables, and that's why we've got the debate that is as shrill as it is today.

Now, having made these two points, I know that you were present when Representative Royce gave his testimony earlier today about what the Civil Rights Division is proposing that the city of Fullerton do. I wasn't familiar with this incident until Representative Royce testified this morning.

But the bottom line was that the consent decree that the city was requested to sign or face litigation wanted—had the Department of Justice wanting the pool of job applicants to be 44.3-percent minority within 5 years. Now, isn't that the Government using the force of these laws to impose a quota system? Because how more specific a quota can you have than 44.3 percent?

Ms. FURAY. That's the Government not using its head, because 44. whatever for all jobs assumes that in that job pool, for each job, that there are 44.3 percent qualified people for this job and then for this very different job, there is still 44.3 percent.

That kind of a system doesn't make sense. We have been told at the University of San Diego, by the city of San Diego, and they did listen to reason, that a certain faculty group should be a higher proportion of women. Actually, we have more female faculty than almost any institution in the State, still less than half.

What the city didn't realize is we don't recruit locally for faculty. First of all, you've got to have a Ph.D. in your discipline. We recruit nationally. We advertise nationally. We interview nationally. And when I pointed that out to them, they said, well, yeah, fine, you know, that makes sense.

So what I would want to know in the Fullerton case is what jobs are they talking about and where does the city recruit these things. It's the only way you can find out that percentage. It sounds like they didn't do their homework.

Mr. SENSENBRENNER. Mr. Royce said that the city of Fullerton was not only supposed to recruit within the city and within Orange County, but within Los Angeles County, as well. I agree that Mr. Patrick didn't do his homework and this is not the only case where Mr. Patrick hasn't done his homework, but it's no wonder why there has been such an adverse reaction when you have the top civil rights enforcement official in this country doing something as stupid as this.

Ms. FURAY. I do on that issue.

Mr. SENSENBRENNER. Thank you very much.

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. Good morning, Sister.

Ms. FURAY. Good morning, Mr. Flanagan.

Mr. FLANAGAN. I feel like I'm back in the third grade.

Ms. FURAY. Pardon me?

Mr. FLANAGAN. I feel like I'm back in the third grade. I haven't said "Good morning, Sister" since then.

Ms. FURAY. Don't worry. I won't slap your hands.

Mr. FLANAGAN. I'll be arthritic at 40 as it is, Sister. Mr. Sensenbrenner, I apologize for my age, but I'll have you know that when you first went to Congress, I was 16.

Sister, you've talked about many past problems. You bring back the specter of segregation and different drinking fountains and I have heard many such expositions in defense of affirmative action which go all the way back to slavery.

My comment to Mr. Sensenbrenner was not merely gratuitous, but it was to demonstrate that I have no personal reference back that far and there are many generations will on their way in this country including the one coming to the fore now that has no permanent or first person reference to such past bad behavior.

Consequently, my view of the implementation of affirmative action laws is not colored by that. I don't view that as a drawback. That is not a problem. I can see a good system, a well-intentioned idea that with every example offered—you today, Sister, have said that it's not working. That's Government. Government is not doing it right.

Sister, this is Government and this is Government trying to do it right and Government failing dismally because we're trying to legislate something that many believe cannot be legislated.

I would ask you, Sister, if we made you empress of the Nation and we permitted you to draw the law as you see fit, how would you change it; would you retain it; or how would you make it so that we can use it productively as opposed to the quota system that it has devolved into and from which we cannot seem to unmire ourselves?

Ms. FURAY. I thought I spoke to that in my comments.

Mr. FLANAGAN. I heard from you only broad statements about how you disapproved and how you'd like to see it bettered. I didn't hear any specific examples of how you'd like to actually change the implementation of the law and how the law should be applied in a situation, for Fullerton, CA, for example. Fullerton has had no complaints of any specific variety yet is still suffering under the brutality of the consent decree because of a perceived injustice. In trying to have a well-intentioned enforcement of a well-intentioned goal that is still onerous and, in my opinion, deeply unfair, Fullerton is burdened by the Federal Government in a way which is expensive, unfair, and counterproductive.

Ms. FURAY. Well, I believe I said that leveling the playing field means to me ameliorating the job monopoly. And how do you do that? By taking positive steps to ensure a strong pool of qualified and diverse applicants from which to choose qualified persons for jobs.

Mr. FLANAGAN. How do you do that, Sister? That's in broad language. How can Government do that?

Ms. FURAY. Government has done it in its requirements in the Executive Order 11246. You have to advertise widely. You have to make sure you contact the groups where qualified people could be there. And there are thousands of businesses.

Mr. FLANAGAN. But how can we measure how that is going to result in a definable, verifiable advantage or leveling the playing field. In a leveling of the playing field, how can we definitively measure progress, which Government must invariably do.

What if all of these things go through and you still wind up with a nondiverse group in there? You're going to have the Justice Department and the Civil Rights Commission come down on you like a hammer under current law and even under that executive order.

It is not workable, in my opinion. I'd like to hear how it can be, because I'd like it to be workable. But I don't see how it can be.

Ms. FURAY. I think that it has worked. It hasn't always worked, but it has worked. There is business after business in this country—

Mr. FLANAGAN. But it is not working now, Sister, and that is the problem we're dealing with today.

Ms. FURAY. Sure it is.

Mr. FLANAGAN. How so?

Ms. FURAY. There are thousands of businesses in this country that are regularly doing the kind of thing that I just described and who are diversifying their work forces with highly qualified people.

Mr. FLANAGAN. I'll give you an example, Sister, of that subject. This is the perverse nature of this and this is how it's wound up. I take you back to Chicago. I love to take people to Chicago when I'm in field hearings. I take you back to Chicago once again.

Ms. FURAY. I'm a midwesterner, so that's OK.

Mr. FLANAGAN. That's good. On Halstead Street, there's a guy who makes lamps and he has 30 employees and the Civil Rights Commission came in and ruined his day by requiring that he have a more diverse employment force. And of his 30 employees, he had 2 whites, 27 Hispanics, and 1 black, because that's the neighborhood. He hires right out of the neighborhood. Everyone who works for him walks to work.

The man advertised all over the city. He couldn't find the qualified personnel to come in. Then he had to open up training programs to be able to train people to maintain a level of ethnic diversity. So that he had to create qualified people to have those jobs.

Finally, he got an acceptable mix of African-Americans and then they came back and said you haven't got enough whites. The poor guy, with a tiny income, and he doesn't make much, there's not a big call for lampmakers in Chicago, most of the guys are delivery guys and a lot of them are minimum wage skill workers that run around and do the small things, basically errand work.

He closed shop because he could not get a population working for him that was satisfactory to the Government of the United States. I think it's appalling that 30 jobs in my district were lost and I think it's appalling that this guy is out of business, having hired an overwhelming percentage of his work force from the minority community, bringing them into the work force and providing good benefit for his community, where is population of employment actually reflected his community.

I think it's unbelievable and I do not see how this law works well. I'd be very interested to hear specific examples of where this law has actually helped the community, helped the industry, and helped the diverse minorities who are trying to be brought to a level playing field as opposed to the broad definitions you've provided. Give me five examples, give me two.

Now, let me have some verifiable touching and concerning interest in this, Sister. I'd like to very much.

Ms. FURAY. I don't have, on the top of my head. I do have records on it and I'll see that you get them.

Mr. FLANAGAN. Thank you. Thank you, Sister. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Flanagan. Sister, we do appreciate your taking the time to testify. Your testimony has been very interesting and helpful. Thank you.

Our next witness will be Lee Cheng, who is currently a law student at the University of California at Berkeley. He is on the board of directors of the Chinese-American Democratic Club and the secretary and cofounder of the Asian-American Legal Foundation. Thank you for being here today.

STATEMENT OF LEE CHENG, SECRETARY, ASIAN-AMERICAN LEGAL FOUNDATION

Mr. CHENG. Thank you, Mr. Chairman and members of the committee. I'm with the Chinese-American Democratic Club and the Asian-American Legal Foundation.

For purposes of background, the Asian-American Legal Foundation was founded just in 1994 to help pursue remedies for situations like the one I'm going to describe shortly, which established civil rights groups were not willing to take on because of a lack of political will and because of ideological commitment to a certain vision of civil rights and affirmative action.

I am not here today as a representative of either one of the organizations. I'm also not here today, to misparaphrase Mark Anthony, to bury affirmative action or to praise it. In fact, I'm not here to advocate the absolute removal of all race and gender-based programs because I firmly believe that there are not only justifiable, but necessary situations for those programs.

That said, though, I share with many previous speakers the convictions that not all and, in fact, very few programs that create preferences on the basis of race and gender are justifiable or, in fact, work as they're intended to work.

And while I do not speak for the whole Chinese or Asian-American community, I believe that the historical and present experiences of the community and, in particular, the program that I'm about to describe to you, demonstrate some of the weaknesses and inherent flaws about determinatively race-based programs.

The program I'm about to describe today technically involves desegregation and not affirmative action. However, I believe it involves many of the same issues and the arguments used to justify both its implementation and continued existence are very similar to those used to justify the use of preferences based on race or gender that purport to benefit minorities and women.

In the 150-year history of Chinese in America, Chinese-Americans have faced long odds in our quest for equality. Beginning with violence against the first Chinese settlers to San Francisco and the exclusion laws erected to prevent immigration and citizenship rights, Chinese-Americans have found equal treatment, as American citizens, very elusive. The phrase "A Chinaman's chance" grew out of that context of the struggle against discrimination.

San Francisco today is very different from its frontier past in many ways. However, despite contemporary San Francisco's progressive reputation, Chinese-Americans continue to struggle to enjoy rights taken for granted by many other citizens. Racism in the traditional sense is still extant, to a diminished degree, but in recent years Chinese-Americans have been and are being victim-

ized by Government and court-imposed programs that are every bit as racist in effect, if not intent.

On Monday, July 11, 1994, a group of Chinese-American parents and students, supported by the Chinese-American Democratic Club, filed a class action lawsuit on behalf of all Chinese-American children and parents in San Francisco against the San Francisco Unified School District and the California Board of Education to overturn discrimination against Chinese-American children in admissions in San Francisco public schools.

The facts aren't in dispute. Since 1983, the San Francisco Unified School District has set fixed ethnic quotas on nine arbitrarily designated groups at all public schools in San Francisco. Applicants to these schools are identified not as Americans, but as members of their particular ethnic groups: American Indian, Chinese, Japanese, Korean, Filipino, black, other white, other nonwhite, and Spanish surnamed.

Neighborhood schools are not allowed to enroll more than 45 percent from any given group, while alternative schools face a cap of 40 percent. All sites must have at least four ethnic groups the school district officials are relatively proud of this system.

Over the last ten years, Chinese-American children have become by far the largest ethnic group applying to public schools in San Francisco. Additionally, at many schools, children of Chinese descent have lower dropout rates, particularly at the higher levels of the public educational system, the high school level.

As a result of these two trends, half of the high schools are capped out for Chinese-American students. While the quotas impact all ethnic groups in theory, 35 of the district's elementary, middle and high schools are at or near the cap for Chinese-Americans, which is by far the most capped out group.

If current demographic trends continue, the discrimination against children of Chinese descent can only get worse. The repugnant effects of this ethnic quota system are perhaps most apparent in the admission policy at Lowell High School, which is the district's premier academic high school. This is a magnet program where admission is supposed to be based on individual merit, as defined by grades and by standardized test scores.

In recent years, however, under pressure to comply with these ethnic quotas, a candidate's ethnicity has become the single most important determinant. As a result of the previously mentioned demographic forces and individual academic achievement, the number of qualified Chinese-American candidates long ago exceeded the 40-percent cap. Currently the district uses the four-chair admission system, based largely on race.

In 1993, for instance, a Chinese-American candidate initially was required to score 66 out of a possible 69 points on the admissions index. It's a numerical merit-based admissions index. And other whites and other Asians needed a 59 to get into Lowell and African-Americans and Spanish surnamed students, a 56, and there was a separate pool for affirmative action.

In other words, a Chinese applicant could only gain admissions—only with one “B” and all as compared to a white applicant or a Japanese applicant who could get conceivably two “C’s.”

I'm not against affirmative action for disadvantaged students. In fact, I believe that society benefits from giving opportunities for motivated but disadvantaged students. However, I am firmly opposed to defining this advantage solely on the basis of race or presuming, as a matter of law, that race is an inherent and insurmountable disadvantage.

The quotas used by the San Francisco Unified School District are not only fixed on arbitrary ceilings, but, in reality, provide admissions preferences to nondisadvantaged groups and individuals.

But behind the rhetoric and numbers of the San Francisco quotas are individual victims. Many Chinese-American children have internalized their anger and pain and they're confused about why they're being treated differently. And a well known national columnist recently compared the plight of these Chinese students at Lowell to similar quotas placed on Jewish-Americans at Harvard in the name of ethnic parity in the 1940's, stating that "we have been here before."

Indeed, we have been here before in the struggle for civil rights. Well chronicled events, like lunch counter boycotts and efforts to attend white schools by African-Americans in the South represent the importance of individual rights—for the individual right to choose rather than proof of the inherent benefits of State-imposed racial mixing.

The San Francisco Unified School District has justified the current discrimination in the name of achieving desegregation under a consent decree and while the district has focused its energy in excess of a quarter of a billion dollars or more of precious public dollars on racial musical chairs in the latest statewide test results, San Francisco County schools ranked a dismal 54th out of 57 counties in California. So clearly the consent decree's not achieving any sort of positive results. Unfortunately, the students who are ending up at the bottom of these achievement studies are the very minority students that these programs are supposed to have helped.

All communities are negatively impacted by the rigid racial quotas. Black and Latino children are capped out of neighborhood schools are often bused across the city in order to ensure that each school has the correct racial mix of four racial groups. In addition, black students are often forced to attend bilingual education programs and Hispanic students and Asian-American students who often need those programs are capped out of those programs.

So in addition to the lengthy busing trips for a lot of young children, it frustrates the ability of parents to become involved in schools in their district.

Just to conclude, as many people feel that the demographics of California in many ways illustrates the future of America, San Francisco's demographics arguably illustrate the future of California. As a result, San Francisco has to face and we have to deal with many of the problems and issues of the country as a whole may not need to face for years, if not decades. But hopefully the rest of America may never have to face many of these problems as long as we do draw the appropriate lessons from San Francisco's mistakes.

First and foremost among them, that people can make mistakes while pursuing a supposedly progressive and well-intentioned agen-

da. In the context of affirmative action and civil rights, it's clear to me that some of the very successes of the civil rights movement have led to unfortunate circumstances, often attendant with the creation of powerful and entrenched interests, with less lofty origins.

In other words, the civil rights movement in some respects behaves with and has the power of an establishment, with a capital E. As with most establishments, far too much emphasis has been placed on enforcing at best the letter of the law and not enough on assuring that the spirit of the law is fulfilled.

In fact, the San Francisco public schools—in the San Francisco schools case, where the underlying goal of providing effective public education to all children has been subordinated to a not necessarily effective means of racial mixing is a clear illustration that the spirit of the law is often thwarted by well-intentioned programs.

As I mentioned earlier, briefly, Asian-Americans have had a unique experience with respect to affirmative action. So far, almost alone among non-European minority groups, Asian-Americans have been on the short end of many racial preference schemes carried out in the name of affirmative action.

In addition to Lowell and the San Francisco unified school district programs and quotas, there are exponent programs, for example, in the UC's that I very firmly believe operate as a *de facto*, if not *de jure* quotas. They are called goals and timetables, but if you scrutinize the data, the gaps in all determinable objective criteria are just very, very wide.

To characterize the disadvantages suffered by individual Asian-Americans as a result of these schemes as reverse discrimination, which is often used to justify programs that disadvantage whites in favor of minorities of any sort, is to fundamentally misunderstand the phrase itself and to demonstrate a shocking disregard and insensitivity to the history of traditional forms of racial discrimination against Asian-Americans.

I believe that the experience of Asian-Americans with many racial preferences will not be isolated or unique for long and already there are indications that other racial minority groups in certain contexts will be negatively impacted by race-based programs that were enacted for their benefit.

As Regent Ward Connelly and some previous speakers have correctly pointed out, a race-based program that benefits one group today could just as easily hurt it tomorrow and it's only in the steadfast enforcement of individual rights that the true goals of the civil rights movement can be attained.

I'd like to thank all of you for allowing me to testify and am available for questions.

[The prepared statement of Mr. Cheng follows:]

PREPARED STATEMENT OF LEE CHENG, SECRETARY,
ASIAN AMERICAN LEGAL FOUNDATION

In the one hundred fifty year history of Chinese in America, Chinese Americans have faced long odds in their quest for equality. Beginning with the violence against the first Chinese settlers to San Francisco and the exclusion laws erected to prevent immigration and citizenship rights, Chinese Americans have found equal treatment as American citizens elusive. The phrase "a Chinaman's chance" grew out of the context of the struggle against discrimination.

San Francisco today is different from its frontier past in many ways. However, despite contemporary San Francisco's "progressive" reputation, Chinese Americans continue to struggle to enjoy rights taken for granted by many of its other citizens. Racism in the traditional sense is still extant to a diminished degree, but in recent years, Chinese Americans have been and are being victimized by government and court-imposed programs that are every bit as racist in effect, if not intent.

On Monday, July 11, 1994, a group of Chinese American parents and schoolchildren, supported by the Chinese American Democratic Club (CADC), filed a class action lawsuit on behalf of all Chinese American children and parents in San Francisco against the San Francisco Unified School District and the California Board of Education to overturn discrimination against Chinese American children in admissions to San Francisco public schools.

The facts are not in dispute. Since 1983, the San Francisco Unified School District has set fixed ethnic quotas on nine arbitrarily designated groups at all public schools in San Francisco. Applicants to these schools are identified not as Americans, but members of an ethnic group: American Indian, Chinese, Japanese, Korean, Filipino, Black, Other White, Other Non-White and Spanish-surnamed. Neighborhood schools are not allowed to enroll more than 45% from any given group, while alternative schools face a cap of 40%. All sites must have at least four ethnic groups.

Over the past ten years, Chinese American children have become by far the largest ethnic group applying to public schools. Additionally at many schools children of Chinese descent have lower drop-out rates. As a result of these two trends, half of the high schools are "capped out" for Chinese American students. While the quotas impact all ethnic groups, 35 of the District's elementary, middle, and high schools are already at or near the cap for Chinese Americans. If current demographic trends continue, the discrimination against children of Chinese descent can only get worse.

The repugnant effects of this ethnic quota system are perhaps most apparent in the admission policy to Lowell High School, the District's premier academic high school. Admission to Lowell is supposed to be based on individual merit as defined by grades and test scores; in recent years, however, under pressure to comply with ethnic quotas, a candidate's ethnicity has become the single most important determinant.

As a result of demographic forces and individual academic achievement, the number of qualified Chinese American candidates long ago exceeded the 40% cap. Currently, the District uses a *four-tiered* admissions policy based on ethnicity. In 1993, a Chinese American candidate initially was required to score 66 out of 69 to gain admission to Lowell, Other Whites and Other Asians a 59 and African Americans and Spanish-Surnamed a 56, and a fourth pool for affirmative action. In other words, a Chinese applicant could only gain admissions with one B and all A's; compared to a White applicant with two C's.

I am not against affirmative action for disadvantaged students; in fact, I believe that society benefits from giving opportunities for motivated but disadvantaged students. I, however, firmly opposed to defining disadvantage solely on the basis of race, or presuming as a matter of law that race is an inherent disadvantage. The quotas used by the SFUSD are not only fixed and arbitrary ceilings, but in reality provide admissions preferences to non-disadvantaged groups and individuals.

But behind the rhetoric and numbers of the San Francisco quota programs are individual victims. Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

The discrimination is systematic and relentless. In the pioneering class of Thurgood Marshall High School, the new academic program created for Fall of 1994 to alleviate the shortage of academic schools, the 40% quota spots for Chinese quickly filled, and dozens of children were rejected simply because they were Chinese while the school remained under-enrolled overall.

A well known national columnist recently compared the plight of Chinese Americans at Lowell to the similar quotas placed on Jewish Americans at Harvard in the name of ethnic parity in the 1940s, stating "we have been here before". Indeed, "we have been here before". As Chinese have historically struggled for equal rights in California, African Americans faced similar conflicts in the Deep South. Well-chronicled events like lunch counter boycotts and efforts to attend white schools by African Americans in the South represent the importance of the individual right to choose.

When Rosa Parks fought to sit at the front of a public bus, she fought for the right of *all Americans* to have equal opportunity to sit *anywhere* on any bus they choose. Similarly, we feel that in San Francisco, children of *any* race should have equal opportunity to attend any school of their choice.

The San Francisco Unified School District has justified the current discrimination in the name of achieving desegregation under a Consent Decree. While the District has focused its energy and millions of precious public dollars on racial musical chairs, it has allowed its schools to rot. With the latest statewide student test results San Francisco

county schools ranked a dismal 54th out of 57 California counties. In particular, many African American and Latino children continue to be failed by the public schools under the twelve year old Consent Decree. Clearly, the cart of racial balancing has displaced the horse of giving all children the education that best serves their interests and needs.

All communities are negatively impacted by the rigid racial quotas. Black and Latino children are capped out of neighborhood schools and are often bused across the city in order to ensure that each school has the correct "racial mix." In addition to the lengthy bus trips for young children, busing frustrates parental involvement and the strengthening of neighborhood schools. I hope that this lawsuit will also spur greater discussion on educational reform to improve the quality of education for all children.

Mr. CANADY. Thank you very much for being here today. We appreciate your taking the time to come and present your testimony. I don't have any questions. Do you, Mr. Sensenbrenner?

Mr. SENSENBRENNER. I don't have any questions.

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. I have just one, Mr. Chairman. Could you do me a favor and repeat your last couple of sentences you just said there? That is a wonderful quote. I'd like to hear that again.

Mr. CHENG. Which one? Thank you very much. I think I quoted Ward Connelly. I paraphrased what he said. He correctly pointed out that a race-based quota that benefits one group today could just as easily hurt it tomorrow and it's only in the steadfast enforcement of individual rights that the true goals of the civil rights movement can be attained.

Mr. FLANAGAN. Yes. That is a terrific quote and I'll say that really cuts to the core of the problem that we're wrestling with here, and that is that no one wants to see anyone disadvantaged and we want to construct the model that will help them from being disadvantaged.

And I would tell you that that quote intimates, to me and to any thinking person listening that the enforcement of the rights guaranteed us under the Constitution will do far more to solve the discriminatory practices on a broad or narrow scale than any overt, preemptive strike by law in a quota flavor variety.

And I believe that quote really cuts very closely, particularly for this subcommittee, to the problem at hand. Thank you, Mr. Chairman. Thank you.

Mr. CANADY. Thank you for being with us today. Our next witness is Mr. Harold Brown. Mr. Brown is president of the Black Economic Task Force. He has held numerous positions at San Diego State University, where he now serves as associate dean for community economic development in the College of Business Administration.

Mr. Brown, we appreciate your being with us today.

STATEMENT OF HAROLD K. BROWN, ASSOCIATE DEAN, COLLEGE OF BUSINESS ADMINISTRATION, SAN DIEGO STATE UNIVERSITY

Mr. BROWN. Thank you, Mr. Chairman. My pleasure to be here. I have distributed a written statement, which I'm assuming that everyone has had an opportunity to read. I won't bother to read that statement.

Mr. CANADY. And let me say this. Without objection, the full statement of all the witnesses will be included in the record for this hearing. Thank you.

Mr. BROWN. I'd like instead, Mr. Chairman, to react to some of the statements that were made previously. One of the remarks that was made that I disagree with strongly—first of all, let me, in a sense, qualify myself. I have lived in San Diego for 42 years. I came here to attend college. And I have been active for the past 35 years in many civic organizations. I think I have a pretty strong understanding of San Diego and a good understanding of what's been happening nationally in regards to African-Americans and other people of color.

One of the remarks that was said was that quotas and preferences without merit produce unqualified people, many unqualified people. I find that to be a very misleading statement in this context. In my work experience, I have found many unqualified people who did not perform to the expectations of the supervisors. I have found those people to be white, and I have found some to be nonwhite.

So to state that the affirmative action program results in people being hired because they lack qualifications, I think, is a very dangerous and very—the statement is very incorrect and it has no validity and there is no evidence to support it.

There was a remark by Congressman Royce that—his comment to what people are doing in this whole affirmative action debate. They're quoting Martin Luther King and they're stating that Martin Luther King's statement about people should be judged on the content of their character and not by the color of their skin, that statement ignores the fact that Dr. Martin Luther King, Jr., and many others of us who fought during the civil rights movement were protesting against the very practices of the United States of America which did not hire on the basis of the content of a person's character, but discriminated on the basis of color, and he was merely trying to redress that particular situation.

Another remark, minorities are victims, that affirmative action somehow makes those of us who have been victims of America's practices, it makes us somehow victims of the program of affirmative action. That I completely do not understand, because there are many African-Americans, all of my associates and many of us, who have had to fight against the past practices and who continue to fight today in San Diego and elsewhere to make sure that those opportunities are there available to us.

The problem that I have, as I stated in my paper, it's not that there aren't things wrong with affirmative action. There are things wrong with all programs that the Government has or that we have at the university. I'm sure we can find things wrong.

What I don't understand, Mr. Chairman, is that some of these instances of affirmative action are used to completely eliminate the whole affirmative action program, the affirmative action program that has helped me and has helped others who have been discriminated against in the past, that that program—now it's decided that that program is completely wrong and should be ousted.

And what I don't hear is that what programs are recommended by the opposers of affirmative action, what remedies are recommended to redress the same problems that affirmative action was addressing. And another problem that I have and which I think is the basic difference that many of us have with the proponents of the elimination of the affirmative action program is this.

Those of us who have been victims and who are still victims fully recognize that affirmative action has helped us and that affirmative action still needs to be in place because the conditions that caused affirmative action to be put in place in the first place are the conditions that exist today.

And so we have a basic difference in those who are proponents saying that the playing field is now even and those people I suppose now have become the experts on race relations. Those of us

who have studied race relations, those of us who have participated in redressing America's problems of racism, segregation, discrimination, those of us who have involved ourselves in that are fully aware that the problems have not gone away.

And I really appreciate the proponents of the elimination of affirmative action who say that we should have a level playing field. Yes, we should. And most of us understand that that playing field is still not level and there are many attitudinal problems that have not changed since the times from slavery and since the time from post-slavery.

Now, I know people don't want to hear the word slavery. They say slavery has no connection with today, and that is absolutely wrong. Slavery, as I stated in my paper, created certain conditions. It created—I know the light went off, but is it OK?

Mr. CANADY. Please continue another couple minutes to conclude your remarks.

Mr. BROWN. Thank you. I know that without recognizing the history of slavery—and one of the remarks, I think from Mr. Flanagan, was that he did not have a first person connection with what happened in the past during slavery, and I can appreciate that. But those of us who call ourselves educated and sophisticated really understand and recognize what slavery caused in our system.

It not only caused certain conditions, physical conditions, but it caused certain mental conditions. It caused certain attitudinal conditions that still exist today. And I think for those who propose legislation to eliminate affirmative action cannot fully understand that, that those conditions are still in existence today.

I'd like to also address very quickly the question that came up about the veterans and the biological factor versus service. And, again, I think that the full appreciation for the African-Americans' role in this society, the women's role in this society, and the American Indian and Latino, the Asians, their role in the society, and I am speaking now specifically for the African-American, to not recognize that the role of the African-American who fought in the wars, who participated in this society as a loyal citizen, who made the contributions even in spite of having second-class citizenship, those contributions which are not recognized to be equivalent to a soldier or a military person who went into the service.

I'm one of those military persons. We went into the service. But my understanding from the remark was that how can you equate veterans receiving preferential treatment to minorities who have been discriminated against in America receiving preferential treatment.

My final remark before the questions is going to be on goals and timetables. Affirmative action was created to redress the problems of discrimination and segregation in the United States. Goals and timetables were set. We set goals and timetables at our university. We also set a program of affirmative action to recruit people of color and women to fill our positions.

Goals and timetables now have been turned into some very negative term of quotas. We teach in our business school that goals and objectives are part of a plan, so are timetables, and if you don't address a problem or the development of an enterprise, for instance, with the business objectives, the goals and timetables, and the re-

sources necessary to implement that, you're considered to not to be a very competent manager.

Now, all of a sudden, to have goals and timetables to redress a problem so horrible as the one we have experienced in America, to now decide that goals and timetables have no meaning when you're addressing that problem is something that I find very, very hard to understand.

Thank you.

[The prepared statement of Mr. Brown follows:]

PREPARED STATEMENT OF HAROLD K. BROWN, ASSOCIATE DEAN, COLLEGE OF
BUSINESS ADMINISTRATION, SAN DIEGO STATE UNIVERSITY

Thank you for holding a hearing in San Diego and providing me with the opportunity to share my feelings on the topic of Affirmative Action.

There are two groups that disturb me regarding this issue of Affirmative Action, (1) the group that wants to retain all Affirmative Action programs and refuses to recognize the need for review and possible modifications, and (2) the group that uses Affirmative Action to scare and mislead the public to benefit their personal interests.

I am a supporter and advocate for Affirmative Action programs that address the problems created by our country over a period of a couple of centuries. America chose to develop its society by incorporating into it a system of slavery and post slavery discrimination. The choice of this economic and social system that denied the privileges of citizenship to its citizens of African descent, resulted in conditions and behavior that still lock out African Americans, other people of color and women from entering the mainstream of America. This was America's choice. It seems to me that America should not retreat from its responsibility to correct those wrongs that we all know took place and for which none of us are proud.

To eliminate the Affirmative Action Program to satisfy the short term interests of those who are seeking political power for themselves or for their political party, represents the poorest example of being an American, and defrauds the American people. Those who are calling for the elimination of the Affirmative Action Program are not basing their decision on fact, but rather on myths and misrepresentations. They claim that the conditions affecting African Americans and other groups have been removed from our society, that the uneven field of the past is now level. The people who make this claim

are intelligent, sophisticated people. So, I know they know better. The Whites making this claim would be horrified at the prospect of living the rest of their lives as an African American and giving up all privileges as a White American. Black Americans who support that claim do so for a host of reasons that could be enumerated and explained but would require time that is not available here. Suffice it to say that they also know better.

The myths go on:

- A. White males are being discriminated against because of Affirmative Action.

My reply to that claim is that when Black Americans made the charge, with much evidence to support it, they were being discriminated against, it has taken centuries for Congress, governors, mayors, legislators and the public to speak out against discrimination. Now, that some White males feel they are being treated unjustly, there is a call from some of our leaders to immediately dismantle all Affirmative Action programs - which violates a very fundamental practice of effective management.

- B. Affirmative Action creates preferences for ethnic groups and women.

Affirmative Action programs have been like a walking cane. A cane will help you walk a little better, but your leg is still broken. Until the break is corrected you will not be able to walk or run normally and compete with those who do not have broken legs. America has not corrected the "broken legs" it created. A review of the numbers will clearly show that minorities and women continue to lag far behind White males in economic progress.

- C. Affirmative Action hurts people of color.

Affirmative Action only hurts people of color when the program is not sincerely implemented. Affirmative Action programs have opened for us the economic doors that have been closed for so long. Even with Affirmative Action, the struggle for equal economic opportunities for people of color and women persists.

I don't believe however, that the real issue regarding Affirmative Action is one of myths and the offering of evidence to dispel those myths. The real issue is whether the American people will permit themselves to be used by politicians and others who would

sacrifice the interests of our nation for their own personal benefit. The real issue is whether the people of this country will permit themselves to be fooled into thinking that the elimination of Affirmative Action programs will somehow make their lives better. The real question in America is not how many jobs White males have lost due to Affirmative Action, but how many jobs White males have lost due to America's loss of jobs by shifting jobs to other countries, or by our country's loss of manufacturing and the jobs that it provided, or how many jobs have been lost to technology, or lost to the inefficiency of the management of our nation's corporations, or lost through our administrations' lack of ability to compete in a globally competitive economy.

So please, don't put the blame on Affirmative Action. Don't blame us, the victims of a horrible system of discrimination. My plea is to the people of America. Don't allow those self interested few divide us against each other. There are much more serious and fundamental problems we as a nation must solve. And we can solve them if we ask the right questions and not let ourselves be manipulated to elect a person or party into power. Let's elect a person or a party on the basis of how they propose to address the really serious and fundamental issues facing our nation - crime, the loss of middle class income, drugs, the economy, creating jobs, protecting against terrorists - both inside and outside U.S. borders, and a deteriorated education system. Is Affirmative Action blamed for these also?

Today our nation finds itself struggling to retain the economic competitive edge that we enjoyed since World War II. Our nation is struggling to find jobs to replace the hundreds of thousands of jobs that were lost over the last couple of decades. We struggle to find a way to make our citizens again feel safe to walk the streets of their neighborhoods and cities. This is not the time to accuse each other and call each other names. This is what those who want to divide us, want us to do. They want us to concentrate on this thing called Affirmative Action and go to the polls and vote for them based on Affirmative Action. Well, I believe the American people are a lot smarter than they give us credit for. If there are some improvements needed to make Affirmative Action work better for this nation, then make those improvements.

To eliminate the Affirmative Action program, and to leave the problems it is addressing unaddressed, sends a terrible message to the millions of people it was designed to help. It seems to me to be foolish to unnecessarily alienate friends who have been loyal and supportive to America's cause. To snatch the cane from us at this point is both unwise and immoral. America has a moral obligation to redress the problems it created for millions of people. We call upon your leadership to lead this nation in a spirit of cooperation and working together. We call upon your leadership to speak out against

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those who fan the flames of fear and distrust. We call upon you to provide the intelligent leadership of objective analysis and evaluation of the Affirmative Action Program, and after review, apply fairness to whatever corrective measures that are needed.

Election campaigns that are run by playing on the fears caused by a system that we all deplore and wish to forget, reflect the lowest form of leadership. As the guardians of our country you are burdened with the responsibility of bringing out the best in this nation. We pray for your strength and courage in carrying out that responsibility. Thank you for this time.

Mr. CANADY. Thank you very much. We appreciate your testimony. I just want to make a couple of observations. There's a lot of talk about doing away with affirmative action. I think if you look at the specific proposals that are being made, you will find that what we're talking about is focused on doing away with race and gender-based preferences.

I, for one, believe that certain types of recruitment and outreach activities are appropriate and should continue. What I have a problem with is where the Government goes to its individual citizens and asks them what their race is or what their gender is and then either awards them a benefit or denies them a benefit on the basis of that answer.

That's where I have the problem. And I agree with you that the history of slavery in this country is a relevant factor for us to think about when we're talking about these kinds of issues. That is part of our history, a shameful chapter in our history, but I do believe that we have made progress in addressing prejudice in this country. I have seen in my own lifetime in the lives of people I know, whose attitudes have changed remarkably over a 20- or 30-year period.

We are not where we want to be, but the question really is whether the continuation of policies which divide us into different racial groups and different gender groups will actually get us to the goal. And I understand that there are legitimate, sincere differences of opinion on that subject and I respect your perspective on that.

But let me just focus on one question. Do you think when it comes——

Mr. BROWN. Excuse me. Before you do, Mr. Canady, may I interject just one point before you ask that question? Governor Wilson today is calling for the abolishment of all affirmative action programs.

Mr. CANADY. Well, I have read some press accounts about what the Governor is going to do and I don't think that that is the consequence of the Governor's action today. But I'm not going to get into an argument or a quibble over the impact of what the Governor is doing. But I think there's another side to that story and I'll let the Governor defend his actions.

But let me ask you if you think that there as compelling a case for preferences based on gender as for preferences based on race. Do you put those in the same category? Do you support gender-based preferences as well as preferences based on race?

And I guess what brings this question to mind is you're focusing on the history of slavery, which I think is an important and relevant consideration for us to look at as we discuss these issues, but, of course, there is not a history of slavery, per se, that would justify gender-based preferences.

What would you say about that?

Mr. BROWN. Well, the reason I focused on slavery is because we all understand and we all are aware of slavery. Slavery merely points out the fact that discrimination took place, slavery and post-slavery. We all—those of us who know a little about history also know and understand that women have also been victims of the same type of discrimination and prejudice. Therefore——

Mr. CANADY. Would you put the discrimination against women on the same level with the discrimination embodied in slavery and the aftermath of slavery in this country?

Mr. BROWN. Well, discrimination against anyone is equally potent. So when you discriminate against women, which we still do today, when we perceive women as being very good secretaries and clerical people, but find difficulty in women being top executives, we do this today.

My wife is an example of that. She has served many years in the private sector. So, yes, discrimination is discrimination. And if it's based on some superficial means, such as the color of our eyes, the color of our hair or our gender, it's equally as potent and it's equally as handicapping.

Mr. CANADY. Thank you. Mr. Sensenbrenner.

Mr. SENSENBRENNER. I just have one question. You talked about goals and timetables and I don't see that there is anything wrong with goals and timetables, but what happens if you don't achieve your goal?

Mr. BROWN. Well, I think then the issue is put in the hands of reasonable people. We pride ourselves in selecting reasonable people to represent us in government, in our institutions of higher education, in schools. We select those reasonable people.

And when the situation arises where those goals and timetables have not been met, then there is a reasonable explanation or there is not a reasonable explanation as to why those goals and timetables have not been met or have not even been——

Mr. SENSENBRENNER. Were you here when Representative Royce testified earlier this morning?

Mr. BROWN. Yes.

Mr. SENSENBRENNER. Did you hear his testimony?

Mr. BROWN. Yes.

Mr. SENSENBRENNER. Do you think that what Deval Patrick, the chief of the Civil Rights Division, is doing to the city of Fullerton is reasonable?

Mr. BROWN. I think to point out one aspect of unreasonableness is not fair, Mr. Sensenbrenner. I don't think it's fair that——

Mr. SENSENBRENNER. But do you think that what he's doing is unreasonable?

Mr. BROWN. I don't know all the facts of that case. Honestly, I really don't.

Mr. SENSENBRENNER. Well, from what——

Mr. BROWN. Based on what——

Mr. SENSENBRENNER. From what Mr. Royce testified to the committee, do you think that Deval Patrick is being unreasonable in saying that a city that's never had a complaint filed against it has to have a pool of 44.3 percent minority within 5 years of job applicants or be sued.

Mr. BROWN. Well, I'll tell you something, Mr. Sensenbrenner. There may be some circumstances that I'm not aware of that makes Mr. Patrick's statement somewhat valid.

Mr. SENSENBRENNER. Then why didn't Mr. Patrick give Mr. Royce the information that was requested by——

Mr. BROWN. I don't know.

Mr. SENSENBRENNER [continuing]. Him as a Member of Congress representing the city of Fullerton?

Mr. BROWN. I don't know. I don't know the answer to that question.

Mr. SENSENBRENNER. Well, neither did he and that's why he was here today.

Mr. BROWN. I don't know the answer to that question, but I do know that we heard one side from Mr. Royce. But there could be circumstances. You say that no one has filed a complaint. For many years, we, as African-Americans, have not filed complaints, and I talk to friends and associates all the time who make complaints as we sip cocktails or sit around joking, but do not file complaints. So that is not a valid reason to accuse or to accept what Mr.—what he said.

Mr. SENSENBRENNER. But, sir, the proposed consent decree that Mr. Patrick sent to the city of Fullerton said that compensation had to be paid to people who never applied for a job because they feared they wouldn't get it. Now, is that the action of a reasonable person?

Mr. BROWN. No. I don't understand that.

Mr. SENSENBRENNER. Well, neither does Mr. Royce and neither do I. That's one of the reasons why people get so turned off at Government; that when someone who has got enforcement authority over a very serious issue of the law does a stupid thing like that, he tries to convince you to clean up your act by punching you in the nose. That doesn't work any time.

Mr. BROWN. I understand, Mr. Sensenbrenner.

Mr. SENSENBRENNER. I yield back my time.

Mr. BROWN. May I respond to that?

Mr. CANADY. Yes, briefly.

Mr. BROWN. We have people who complain about a particular thing that probably happens at the university in regards to personnel practices and maybe an employee does something that is not very smart. But we have not yet attempted to throw out our personnel practices. We have only decided that we must in some way correct what has happened and maybe modify that, but we haven't—no proposal has come forth that we throw out all of our personnel practices.

Mr. SENSENBRENNER. Well, sir, I would submit that there is a different standard applied to the people that you deal with at the university and someone who has been appointed by the President of the United States as the Nation's top civil rights enforcer.

Mr. BROWN. Well, there might be, but I'd say he's still human and that person has a reaction as a human being regardless. And I do think that you cannot take one instance and use that to justify the removal of the affirmative action program.

Mr. CANADY. Again, I'd just make the point that I don't think anyone is talking about eliminating all affirmative action efforts. I don't think that that is what is on the agenda. There may be some, but I don't think that that's what is going to be on the agenda in this Congress. We're talking about specific aspects of the program which are discriminatory in their impact.

Again, we appreciate your taking the time to be with us today. Your testimony has been very helpful. Thank you very much.

Mr. BROWN. Would we get a chance to see your proposed legislation, Mr. Canady?

Mr. CANADY. Absolutely, yes. We'll be certain to get a copy of it to you when it's available.

Mr. BROWN. Thank you.

Mr. CANADY. Thank you. Our next witness today is Arthur Bierer, who is an undergraduate student at the University of California at San Diego. Mr. Bierer was denied a scholarship under the Federal national science scholars program because of his gender. Thank you for being here today.

STATEMENT OF ARTHUR L. BIERER, STUDENT, UNIVERSITY OF CALIFORNIA AT SAN DIEGO

Mr. BIERER. Good morning. Thank you very much. Please excuse my greenness, as this is my first appearance before any committee, let alone a congressional subcommittee. I don't have the speaking experience that some of my associates here have had.

I'm a junior at the University of California at San Diego and my major is computer science. Thank you very much, once again, for letting me be here.

I was a victim of reverse discrimination when I was a high school senior and I was denied a national science scholarship—not because I did not qualify, but because I was a boy. On July 30, 1992, I was sent a letter congratulating me for being chosen by the California selection committee for one of two national science program scholarships in my district.

The letter told me my “work and dedication were commendable,” that I should take “great satisfaction in knowing” that my accomplishments and dedication were noteworthy and that my achievements were a strong model for other youth in California.

I was told that I was a truly exceptional individual. Unfortunately for me, exceptional or not, I was a boy. On August 5, 1992, I was sent another letter, saying that although I was one of the top two winners in my district, the Federal statute dictated that at least one winner must be female. I later found out that, through second sources, that it didn't prevent two females from winning.

I later found out in a telephone call after my first one returned that in my district, I was No. 2 winner and the No. 1 winner was also a boy. So the law dictated that they must go down to No. 4, which was a female. And although I had strong math skills, I had a hard time figuring out the logic in this decision.

The July 30 congratulations letter was a great letter to receive. I had worked very hard in high school, not looking for recognition or adulation. I took advanced mathematics and science at UCLA, taught computer science classes to fellow high school students. While other high school kids became heroes on the basketball court or stars on the theatre stage, I spent lots of time in solitude creating computer models, learning about artificial intelligence, and development of scientific experiments.

Winning the national science scholar program scholarship was a dream come true for me, especially because I had never received public attention for my love in science.

Learning that I did not win was fine with me, actually. If it turned out to be another kid who had some scientific achievement

that was better than mine, I would have been interested in learning who he or she was, what he or she had developed, how I could meet him or her. In a world based on merit and performance, losing to a more qualified person would have made sense.

Losing to No. 4, a female, because I'm a boy only makes the sense in society where artificial standards of achievement are invented and imposed. I had, up until this incident, believed that the Constitution guaranteed equal rights and equal protection and that society was moved forward by an individual's merit and achievement.

Making winners lose and losers win dictates American values, like hard work, and tarnishes dreams, like becoming the best and the brightest.

I'd like to add one last point about the deleterious effect of reverse discrimination. The Government will lose the best people. Growing up, I had wanted to bring my scientific skills into Government research. I had often thought of creating models for the CIA's computers or developing technology for nuclear submarines, which I was quite fond of as a boy.

The Navy had much to do with my decision to attend college here in San Diego. A component of the national science scholarship program was a Government scientific research internship. Since I was denied this scholarship, but wanted a research opportunity, I applied and was accepted to Microsoft for four times for paid internships. Bringing my scientific expertise and computer background into Government seems remote.

My ideal about working for the Government has drifted away, in large part because of this incident.

I thank the committee for its time and consideration. I hope that the system now which does not reward he who works hardest and wins changes to something more in sync with the Constitution as I thought it was written. It is time to return the American spirit to the U.S. Constitution.

Thank you.

[Applause.]

[The prepared statement of Mr. Bierer follows:]

PREPARED STATEMENT OF ARTHUR L. BIERER, STUDENT,
UNIVERSITY OF CALIFORNIA AT SAN DIEGO

Good morning. My name is Arthur Bierer. I am a Junior at University of California at San Diego where my major is computer science. I am glad to be here today.

I was a victim of reverse discrimination when I was a high school senior and was denied a national science scholarship not because I did not qualify -- but because I was a boy.

On July 30, 1992 I was sent a letter "congratulating" me for being chosen by the California Selection Committee for one of two National Science Scholars Program scholarships in my district. The letter told me my "work and dedication was commendable"; that I should "take great satisfaction in knowing" that my "accomplishments and dedication were noteworthy" and that my "achievements were a strong role model for other youth in California." I was told that I was "a truly exceptional individual."

Unfortunately, for me, exceptional or not, I was a boy.

On August 5, 1992, I was sent another letter saying that although I was one of the top two winners in my district the federal statute dictated that at least one winner be female. I later found out in a telephone call (after many first went unreturned) that in my district I was the Number Two winner, and the Number One winner was also a boy. So, the law dictated that they go down to the Number 4 person, who was a girl, and make her Number 2. Although I had strong math skills, I had a hard time figuring out the logic in this calculation.

The July 30 "congratulations" letter was a great letter to receive. I had worked very hard in high school -- not looking for recognition or adulation. I took advanced mathematics and science classes at UCLA and taught computer science classes to fellow high school students. While other kids became heroes on the basketball court or stars on the theater stage, I spent lots of time in solitude creating computer models, learning about artificial intelligence and developing scientific experiments. Winning the National Science Scholars Program scholarship was a dream come true for me -- especially because I had never received public attention for my love of science.

Learning that I did not win would have been o.k. if it turned out another kid had some scientific achievement that was better than mine. I would have been interested in learning who he or she was; what he or she had developed; how I could meet him or her. In a world based on merit and performance, losing to a more qualified person would have made sense. Losing to Number 4, a

girl, because I am a boy only makes sense in a society where artificial standards of achievement are invented and imposed.

I had, up until this incident, believed that the Constitution guaranteed equal rights and equal protection -- and that society was moved forward by individuals' merit and achievements. Making winners lose and losers win dilutes American values, like hard work, and tarnishes dreams, like becoming the best and the brightest.

I would like to add one last point about the deleterious effect of reverse discrimination. The government will lose the best people. Growing up I had wanted to bring my scientific and analytical skills into government research. I often thought of creating models for the CIA's computers or developing technology for nuclear submarines. The Navy had much to do with my decision to attend college in San Diego. A component of the National Science Scholars Program scholarship was a government scientific research internship. Since I was denied the scholarship but wanted a research opportunity, I applied and was accepted to an internship program at Microsoft. I have since returned to Microsoft four times for paid internships. Bringing my scientific expertise and computer background to the government seems remote. My ideal about working for the government has drifted away -- in largest part because of this incident.

I thank the Committee for its time and consideration. I hope that the system now -- which does not reward he who works hardest and wins changes to something more in sync with the Constitution, as I thought it was written. It is time to return the American spirit to the United States Constitution.



CALIFORNIA DEPARTMENT OF EDUCATION

Bill Honig

721 Capitol Mall; P.O. Box 944272

State Superintendent

Sacramento, CA 94244-2720

of Public Instruction

July 30, 1992

Arthur L. Blerer
706 North Foothill Road
Beverly Hills, CA 90210

Dear Arthur:

Congratulations! You have been chosen by the California Selection Committee for one of the two National Science Scholars Program (NSSP) scholarships in your congressional district.

Although many students were clearly qualified and deserving, only two students per congressional district could be selected. The President of the United States, in consultation with the Secretary of Education and the Director of the National Science Foundation, will award the scholarships based on the ranking determined by the Selection Committee.

The President is expected to announce the scholarship recipients after mid-August, and an acceptance form will be sent within 4-6 weeks. The Secretary will subsequently disburse the scholarship funds on behalf of the NSSP to the school you have selected to attend.

As you know, the NSSP selection process is based on written applications, transcripts, and recommendations without the benefit of first-hand observations of each student, so all applicants are best described as representatives of the best science, mathematics, and engineering students in California.

Your hard work and dedication are commendable. You should take great satisfaction in knowing that your accomplishments and dedication are noteworthy. Your achievements are a strong role model for other youth of California. We urge you to continue your hard work and strive for success; you are truly an exceptional individual.

Best regards,

Bill Honig

Sally Mentor, Deputy Superintendent
Curriculum and Instructional Leadership Branch
(916) 657-3043

BH:jrh



CALIFORNIA DEPARTMENT OF EDUCATION

721 Capitol Mall; P.O. Box 944272

Sacramento, CA 94244-2720

Bill Honig

State Superintendent

 of Public Instruction

August 5, 1992

 Arthur L. Blerer
 706 North Foothill Road
 Beverly Hills, CA 90210

Dear Arthur:

Last week I sent you a letter informing you that you had been chosen by the California Selection Committee for one of the two National Science Scholars Program (NSSP) scholarships in your congressional district. The President is expected to announce the scholarship recipients after mid-August, and an acceptance form will be sent within 4-6 weeks.

Unfortunately, we sent the letter under the assumption that the President would select our top two applicants in each congressional district, and this was a serious mistake. In the first place, we cannot speak for the President, and second, we understand that according to statute his choices will include at least one female applicant from each congressional district. It is likely that you will be a runner-up to the winners in your district. That means that you may be chosen to complete the term of the scholarship (four or five years) should one of the winners become ineligible or drop out of the program.

We realize the disappointment this is causing you and deeply regret our error. If you wish to speak with someone in our office regarding this matter, you may call Thomas Sachse, Manager of the Science and Environmental Education Unit, at (916) 657-4863. You may write to me at the above address.

With sincere regrets,

 Sally Mentor, Deputy Superintendent
 Curriculum and Instructional Leadership Branch

SM:jrb

Mr. CANADY. Thank you very much. We very much appreciate hearing of your experience. I regret that you have gone through this experience, because I think you have suffered an injustice. I don't think there's any other way to describe that, and I think you have presented a perfect example of what is wrong with the existing system and that's the sort of thing that we want to correct, to make certain that Americans are not discriminated against because of their race or gender.

We appreciate your taking the time to come here today and give us your testimony. Mr. Sensenbrenner.

Mr. SENSENBRENNER. I don't have any questions. Thank you for coming.

Mr. BIERER. Mr. Chairman, I don't want to appear as an angry white male, as I seem to appear. In fact, I just hope that the system in the future will be corrected. I don't need any reparation or anything.

Mr. CANADY. I understand that. And I think there's been a lot of talk about angry white males that, quite frankly, is unjustified and I think that is a concept which is being used to potentially demonize people who simply have a view about what is right and what is just and what is the American way. I don't view you as an angry white male. I view you as someone who has had an experience which is very relevant to our considerations here today and thank you for taking the time to come.

Mr. BIERER. Thank you very much, Mr. Chairman.

Mr. CANADY. Our next witness will be Mr. Joe Martinez, who is president of Martinez, Cutri & McArdle, an architectural firm located here in San Diego. Mr. Martinez.

STATEMENT OF JOSEPH MARTINEZ, ARCHITECT, MARTINEZ, CUTRI & McARDLE

Mr. MARTINEZ. Thank you, Mr. Chairman. Good morning, members of the House Judiciary Committee. I would like to take this opportunity to share with you over 30 years of affirmative action opportunity in a case study method and using my personal experience as a Mexican-American businessman, university instructor, undergraduate and graduate student.

The scope of my presentation will focus on three topics. The first is the University of California. The second is the sail to victory delegation for the 1996 Republican National Convention. The third is the private sector. In order to appreciate my testimony, I'd like to provide a little background information. In 1966, I entered the University of California at San Diego. As a 17-year-old freshman, I was recruited to the university under the equal opportunity program.

While at UCSD, I participated in a number of student activities, including the cofounding of M.E.C.H.A., which is a Hispanic student organization, the cofounding of Third College, which is now Thurgood Marshall College, and the development of that college's master plan, as well as serving on other EOP student recruitment committees and other activities of UCSD.

With a double major in visual arts and mathematics, I graduated from UCSD in 1971 and traveled to Harvard University, obtaining my master's in architecture in 1975. Clearly, this 10-year journey

has provided many rewards for me, as you will see in the attached biography.

This could not, however, have happened without two UCSD professors wondering why, in 1964 and 1965, as to the lack of enrollment of undergraduate students who were either of Asian-American, African-American, or Mexican-American descent. These two professors, in 1966, went out and created an affirmative opportunity.

So in this first case studies method, I'd like to focus on the University of California at San Diego. The university certainly is a very prestigious institution of higher learning. Likewise, it has been readily acknowledged by the administration that its enrollment of students, recruitment and promotion of faculty, recruitment and promotion of administrative personnel, as it relates to ethnic minorities is still less than satisfactory.

These points have been discussed ad infinitum. However, I would like to pursue another area, an area which has received very little attention, and that is professional services; as an example, architecture and engineering.

In 1991 and 1992, the total business dollars expended at UCSD was over \$264 million. White male-owned business accounted for 86.3 percent, and that's over \$228 million. White-owned women firms, 6.8 percent. Minority male owned firms, 6.2 percent, and minority women, .7 percent.

I should mention that within the city of San Diego and the County of San Diego, there is a diversity of 20 percent Hispanic, 9 percent African-American, and 11 percent Asian. That's nearly 40 percent.

In fiscal year 1993-94, UCSD awarded over \$10 million in design professional service fees. How many of these projects were awarded to prime minority firms? None. For the past 10 years, my firm has tried to obtain projects for the university and we have yet to succeed.

In California, there is presently discussion surrounding the repeal of assembly bill 1933, which requires State agencies to have statewide participation targets, a minimum of 15 percent for DBE's and 5 percent for WBE's. Given the previously cited statistics, clearly this assembly bill is working for white male owned businesses.

Sail to Victory. I was part of a team, a delegation from the city of San Diego which made the presentation to the site selection committee of the Republican National Convention to host that convention here in San Diego. I want to call to your attention a very interesting phenomena which occurred in that presentation.

The composition of the delegation reflected the cultural diversity of the San Diego community. That is to say half of the team consisted of the director of the convention center, fire captain, the virtual reality computer programmer, who happened to be African-American, the telecommunications specialist, the assistant fire captain, who happened to be female, the telephone specialist, who happened to be an Asian-American, and the executive architect, who happened to be a Mexican-American.

All of these professionals, which so dearly impressed the site selection committee, most likely started college in the 1960's and in

some form or fashion, within successive years, they significantly enhanced their talent to be the best.

My point, and much to the contrary of those who say that affirmative action has completely failed, given the opportunity to be trained and, in turn, opportunities for advancement and promotion and the like based solely on the merit may one day be a reality. However, given the present statistics for ethnic minorities in the United States and a long distance yet to travel for equality, race still needs to be one, but not the only factor under consideration.

The private sector. With all the skills and know-how that I've acquired over the past years, I must tell you that the good old boy network is alive and well. There are many projects in my 20 years of experience that have been awarded to others and I did not want to list them out of fear of being depressed all over again.

Believe me when I say that it will be well into the next millennium before the private sector reflects the composition of society. Thus, the only possible salvation for a harmonious multicultural society rests with the public sector.

Thank you very much for this opportunity, Mr. Chairman.

[The prepared statement of Mr. Martinez follows:]

PREPARED STATEMENT OF JOSEPH MARTINEZ, ARCHITECT,
MARTINEZ, CUTRI & MCARDLE

Honorable Members of the House Judiciary Committee:

I would like to take this opportunity to share with you over 30 years of affirmative opportunity. In a case study method, and using my personal experience as a Mexican-American businessman, university instruction, and undergraduate and graduate student, the scope of my presentation will focus on three topics. They are: (1) The University of California, (2) Sail to Victory: 1996 Republican National Convention, and (3) the Private Sector.

In order to appreciate my testimony, I would like to provide a little background. In 1966, I entered the University of California at San Diego (UCSD). As a seventeen year old freshman I was recruited to the University under the Equal Opportunity Program (EOP). While at UCSD, I participated in a number of student activities, including: the co-founding of Mecha (a Hispanic students organization), the co-founding

of Third College (now called Thurgood Marshall College) and the development of the college's master plan, as well as, serving on the EOP student recruitment committee and other related activities. With a double major in Visual Arts and Mathematics, I graduated from UCSD (1971) and traveled to Harvard University, obtaining by Master of Architecture degree in 1975. Clearly, this ten year journey has provided me many rewards as the attached biography will attest. This could not have happened without two UCSD professors wondering why there were not any undergraduate students of Asian, African-American or Mexican-American decent enrolled at the university in 1964 and 1965. These two professors -- in 1966 -- went out and created an "affirmative opportunity".

The University of California, San Diego

The University is certainly a very prestigious institution of higher learning.

Likewise, it has been readily acknowledge by the administration that its enrollments of students, recruitment and promotion of faculty, and, recruitment and promotion of administrative personnel as it relates to ethnic minorities is still less than satisfactory. These areas have been discuss ad infinitum. However, an area which receives little attention is professional services, such as, architecture and engineering.

In 1991-92, the total business dollars expended by UCSD was \$264,813,279. White male-owned businesses accounted for 86.3% (\$228,522,400); white women-owned , 6.8%; minority male-owned, 6.2%; and, minority women-owned, 0.7%. I should mention that San Diego County is comprised of 20% Hispanic-Americans, 10% African-Americans, and 9% Asian-Americans.

In FY 1993-94, UCSD awarded \$10,022,694 in design professional service fees. How many projects of any significance were awarded to prime minority firms? None. For the past ten years my firm has tried to obtain projects from the University--we have yet to succeed.

In California, there is presently discussions surrounding the repeal of AB 1933 which requires state agencies to have statewide participation targets of a minimum of 15% for DBE and 5% for WBE. Given the previously cited statistics, clearly AB 1933 is working for White-male owned businesses.

Sail to Victory

I was a member of the San Diego delegation which made the presentation to the Site Selection Committee of the Republican National Committee to host their Convention. As you know, this event will take place in San Diego.

I want to call to your attention to an interesting phenomena. The composition of the delegation nearly reflected the cultural diversity of the San Diego Community. That is to say, half of the team consisted of: the director of the San Diego Convention Center, the Fire Captain, and the Virtual Reality Computer Programmer who happened to be African-American, the tele-communication specialist and the assistant Fire Captain who happened to be female, the telephone specialist who happened to be Asian-American, and, the Executive Architect who happened to be Mexican-American. All of these professionals, which so impressed the Site Selection Committee, most likely started college in the 1960's. And, in some form or fashion, within the succeeding years, they significantly enhanced their talents to be the best!

My point, and much to the contrary of those that say Affirmative Action has completely failed, given the opportunity to obtain equitable training, then, in turn, opportunities for advancement, promotion and the like based solely on merit may one day be a reality. However, given the present statistics for ethnic minorities in the United States, and the long distance yet to traveled for equality, race still needs to be one--but not the only-- factor under consideration.

The Private Sector

With all the skills and know-how I've acquired over the past years, I must tell you that " the good old boy network is alive and well". There are so many projects in my twenty years of experience which have been awarded to others, that I did not want to list them out of fear of being depressed all-over-again.

Believe me when I say, it will be well into the next millennium before the private sector reflects the composition of society. Thus, the only possible salvation for a harmonious multi-cultural society rests with the Public Sector.

Thank you very much for this opportunity; I would be pleased to answer any questions you may have.

Mr. CANADY. Thank you very much, Mr. Martinez. I don't have any questions. Mr. Sensenbrenner.

Mr. SENSENBRENNER. No questions. Thank you for coming.

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. I have just one question. Concerning your last comment about the good old boy network that's alive and well, I come from the land of the good old boy network in Chicago, IL. And I would ask you just one question about that, and having seen many contracts offered to people who are friends or neighbors or business associates or whatnot.

Your reference to the good old boy network, is that racially motivated good old boy network? I'm only going to give this contract to whites because I'm white or I'm only going to give it to men because I'm men or I'm only going to give it to Hispanics because I'm Hispanic.

Mr. MARTINEZ. The good old boy network, as I use it in my presentation, refers to those underlying relationships that automatically and necessarily progress, continue to maintain the status quo. So it's the friends that went to the elementary school, that went prepping at a private high school, then went to college and then became part of a fraternity, who are now business associates, who now play golf together and wanting to do deals together. That is a natural way of doing business in the private sector and to penetrate that—to penetrate that and looking in a more holistic manner, it is very difficult certainly to try that first attempt in the private sector, so, therefore, the public sector can provide that framework—that is to say through Government—and, in turn, enhance the prospects so that we will have a harmonious multicultural society.

Mr. FLANAGAN. I would say I'm the first one to stand up and say that the open bidding and giving to the best qualified, most qualified, whatever race, creed, color, sex, whatever else is, is the best of all possible worlds.

But my question about affirmative action and the subject of these hearings today is although the old boy network tends to benefit the friends of those who are currently in power in the public sector, is it race-based? Is it racially discriminatory purposefully?

And consequently, we passed law, apart from Shackman, that will try and control that sort of environment, but can we pass law to say to address a problem that's not racially discriminatory, and I don't believe the old boy network is racially discriminatory in the context you're talking about it. I think it just results that way, and this is a bad thing and you get no argument from me about that.

But can we legislate that out of existence, trying to address a problem of race-based discrimination when the discrimination is not purposefully race-based, but happens to work out that way. Should we not approach that problem differently with maybe stronger Shackman or more open bidding laws or actually take the process down from the lack of preferences, whether they be personal acquaintances or whether they be because of a particular status of a bidder, and actually open it up completely? Is that not the solution to the old boy network in the context you're talking about as opposed to declaring new preferences, so that my personal

friends, if I were in a contract-giving situation, would not be benefited?

Mr. MARTINEZ. The best solution was presented earlier by the provost from the University of San Diego. She had indicated that in a time frame, that it is not correct to provide those certain goals or quotas, but in an expanded context, over many generations, and that's what I showed with my example here, over many generations, those entry-level positions and intermediate positions, as time goes by, the next three or four generations, you will then have those individuals in those senior positions that can compete one-on-one without any race-based criteria, gender-based criteria, can compete one-on-one.

One easy example to see is that in my family, all of my family, before my birth, no one ever went to college. In my immediate family, my two sons, one of them received his B.A. in economics with honors from Harvard and now is in the Harvard Law School, second year. My other son is at the university studying banking and finance.

That was an opportunity that was then passed on to one generation, which, in turn, will be passed on to the next generation and the following generations, and maybe sometime in the second portion of the millennium, we won't be talking on this type of matter or subject.

Mr. FLANAGAN. And my question to you is—and I'm glad that you recognize that preferential, whether it be bidding or hiring or whatever form it may take, does have a finite life. And I think a lot of what these hearings have to do is not to say that it's never worked, but that it has worked but its time has come. We've got problems from the way it's being enforced now to the way it's been perverted in very specific examples of gross inequity.

And my question to you still stands. If we're worried about the old boy network and we are worried about preferential hiring, we're worried about preferential bidding based upon personal acquaintance, is the way to approach that problem to say that we have to have ethnically diverse bidding and ethnically diverse hiring or gender diverse bidding and gender diverse hiring, however it may be? Are we not trying to apply the wrong solution to the wrong problem? Having identified the problem, do we not need a different solution, not this solution?

Mr. MARTINEZ. I don't know if there is a different solution which would make—

Mr. FLANAGAN. Shackman tried. Do we not need stronger laws in that vein as opposed to simply saying, well, we can combat the old boy network, we can say you can't hire your friends, you cannot hire your acquaintances, who, coincidentally, happen to be ethnically similar to you, perhaps gender similar to you, rather than to combat that problem by saying, well, we're going to attack the symptom of the friends and that is that they are white males, let's say, and we're going to have African-Americans and Hispanics and women. Can we just stand up and say you can't hire your friends and have stronger Shackman laws?

Is that not the correct solution to a well identified problem as opposed to saying let's take a symptom of this problem and attack that and hope for the best?

Mr. MARTINEZ. Part of the difficulty in this entire debate is the understanding of terms and the manner in which each is applied, and, again, referring to a case studies method. I like Professor Brown's comments relative to slavery and to gender discrimination. There has to be a manner of intervention. There has to be a manner of looking at a holistic approach to a very complex situation.

I draw an example to an elementary school that I'm designing here in San Diego where 98.3 percent of the enrollment is Hispanic. Probably 75 percent of the students are bilingual, bicultural. In the development, and yet to happen, of the faculty and the principals and the administration, the school district is going to establish a certain criteria, whatever that might be and yet to be developed, of the impacts on—I don't want to say impacts—what the composition of that educational facility will be to enhance the quality of education for this neighborhood and, in turn, for society in the 21st century.

It's not a singular issue, it's not a singular manner. There is not a singular framework. The issue is dynamic and, again, as the provost had indicated earlier, you cannot put it in isolation. It's something that is evolving over time. It is fluid.

Mr. FLANAGAN. I have not got a response to my question, but I'll yield back. Thank you, Mr. Martinez.

Mr. CANADY. Thank you, Mr. Martinez. We appreciate your taking the time to testify here today.

Our final witness today is Ezola Foster, who has been a teacher in the Los Angeles unified school district for over 30 years. She is president of Americans for Family Values. Ms. Foster, we very much appreciate your taking the time to testify today.

STATEMENT OF EZOLA FOSTER, PRESIDENT, AMERICANS FOR FAMILY VALUES

Ms. FOSTER. Thank you very much for having this angry black woman here today. I appreciate it. As Americans for Family Values president, I thank you for the opportunity to testify before you on group preferences and the law as it pertains to the education of our youth.

We take group preferences to mean legally required treatment of people according to their group status, with a person being either in the majority or a minority.

Certainly, born black, raised poor, educated disadvantaged, worked in Watts, living in south central Los Angeles for 29 years, I believe I have about as much authority as anyone else who professes to speak for the black minority in America.

For more than 30 years, I've served in classroom teaching and administrative capacities in the Los Angeles unified school district, the second largest school district in America.

Beginning in 1963, my first 20 years were spent at David Jordan High School in the Watts community. This school, then a black school, has rich history. It was this school via the NAACP's 1963 *Crawford* case that brought school busing to the city of Los Angeles.

It was this school that was used as the blueprint for special programs, for special students, at special schools, Elementary Second-

ary Education Act, ESEA, and this is what we call preferences in education, throughout America, following in the 1965 Watts riots.

Beginning in 1985, and since I have been a classroom teacher at Bell High School, the school's enrollment has been majority Hispanic. Hispanic here means the all-inclusive definition for Cubans, El Salvadorans, Guatemalans, Mexicans, and Nicaraguans. Currently the school is over 98 percent Hispanic. In 1960, I received a bachelor of science in business education from Texas Southern University, formerly known as Texas State College for Negroes, in Houston, TX. In 1973, I received my master of science in school management from Pepperdine University, Malibu, CA. In between these years, I studied at UCLA.

I say all this to say that when it comes to talking about the effects of preferential laws on America's public school children, certainly my training and my experiences give me as much credentials as anyone who professes to speak with authority for minority students. Again, I thank you for the opportunity to do so.

We recognize and applaud the efforts of Congress to answer to the needs of the minority students. We therefore wish to offer two suggestions on how best to do so, while, at the same time, answering to the needs of majority students, as well.

First, we would ask Congress to eliminate the ESEA, the preferential treatment of K through 12 students. Categorizing children into special groups calls for unhealthy competition between students and it negatively impacts their learning environment.

Special in the sense of qualifying for preferential treatment singles out minority children as being poor, impoverished, disadvantaged, ghetto, barrio, urban, at risk, welfare students. I ask you to think for a moment of your high school days, of being teased. How many of us were not?

Imagine having to wear labels because of where you live. You become inner city, you become an urban ghetto person, or how much money your parents make. All the kids realize you're economically depressed. Or just maybe you might be prone to violence. You are the kid that's called at risk. Children, by nature, have a tendency to tease each other.

The vast majority of our children are good natured about it. It's all part of growing pains, the same way we all had to grow up with it. It is very difficult to be good natured, however, when cause for the tease is inflicted by one's own Government. Despite all the efforts of the education establishment, self-esteem classes, self-esteem meetings, self-esteem seminars for minority students, unless we remove the scarlet letter or what the students see as their dumb label disguised in political terms, self-esteem will continue to be hard to come by.

The Elementary and Secondary Education Act accords minority children preferential treatment by awarding more taxpayer dollars for their education than is given to majority children. By 1989, minority students were receiving \$5.4 billion more per year than the majority students for their education. And excuse me for not being up to date on my information, but I believe right now it's \$7.2 billion and, of course, you would know better than I.

The prime objective of the Elementary and Secondary Education Act was to bring the reading levels of minority students up to the

reading levels of majority students. Now, this, again, was in the 1960's.

Well, here we are some three decades later, additional funding later, special programs later, and the most recent assessment of reading skills which came out only last month, called the Nation's Report Card, shows that the reading levels for both the majority and the minority students leave much to be desired. And I have given to you an exhibit on that and just what it says.

Government enforced preferential treatment has also bred an unhealthy and dangerous environment at schools where cultural celebrations are in fierce competition. Dissing, which is disrespecting one's culture, is one of the main reasons, second to gangsterism, for violence on our public school campuses, particularly in what is called minority communities.

I have given to you five exhibits showing 1990, 1991, 1992, 1993, and even as recently as a few months ago, in fact, as of yesterday, though it has not been reported, that there is fighting among our children on our public school campuses simply because they each have a culture that has to be recognized.

It is incumbent on an American Congress to recognize the duty and need for teachers to teach American culture in our American public schools. Both Audie Murphy and Jesse Owens were American heroes, not an Anglo role model for majority students, not a Negro role model for minority children. Both men were role models for all of America's children.

While an attempt to recognize each and every culture of children attending American public schools may be a noble gesture, it reinforces inferior feelings among minority students and introduces second class status to majority students. Various media interviews with black gang members always get the same answer to the question why do you belong to a gang, what made you become a gang member. No matter the gang or its degree of violence, the answer is, I wanted to belong.

When it comes to belonging, the black minority student is at a loss as to his culture. There are American public schools teaching the black minority student that his is an African culture, but such cannot be defined. Africa is a continent with many countries, each with its own culture. Yet, the black student is not familiar with which country the culture he is learning is associated or, indeed, if such a culture actually exists.

What we've done is, we've allowed a lot of people to come into our public schools and give opinions to our children as though they are facts, but this is what preferential treatment has led to. Given the proximity of Mexico to California, it's only natural that in the Hispanic schools, the largest number of students enrolled is Mexican. Despite each country identified as Hispanic having its own culture, it is the Mexican culture that is celebrated in Hispanic schools.

At these schools, again, I have provided for you evidence showing that even among the Hispanic cultures, where there may be less than 1 percent white and 1 percent black or any other group represented, there are still problems with each trying to recognize its own culture.

Very quickly, the second one we're asking you to eliminate would be Government-funded scholarships. We feel that it is the responsibility of the American taxpayers and it is the right of our children to receive a quality public education from kindergarten through grade 12. Transforming our public schools from socialist training camps to academic learning centers would go a long way to providing our society with an alert, law-abiding, civic-minded, productive citizenry with or without a college education.

We realize that a college education is a great advantage to have, but it is not the responsibility of the taxpayers to do this. Our responsibility is to provide a quality education for our children. And I think that if we stick to that, we will have a society that's much better off and much less involved in the divisiveness that we are now receiving.

Learning is not easy, but it sure is worth it, and causing our children to believe otherwise should not be a function financed by the American people. Our proposals may seem harsh, but now more than ever our children need your tough love.

Thank you very much for having me today.

[The prepared statement of Ms. Foster follows:]

PREPARED STATEMENT OF EZOLA FOSTER, PRESIDENT,
AMERICANS FOR FAMILY VALUES

As Americans for Family Values President, I "thank you" for the opportunity to testify before you on "Group Preferences and The Law" as it pertains to the education of our youth.

We take "Group Preferences And The Law" to mean legally required treatment of people according to their "group" status, with a person being either in the "majority" or a "minority."

Certainly, born black, raised poor, educated disadvantaged, worked in Watts, lived in South Central Los Angeles 29 years of my adult live, I qualify to speak with as much authority as anyone who professes to speak for America's black "minority."

For more than 30 years, I have served in classroom teaching and administrative capacities in the Los Angeles Unified School District (the second largest school district in America).

Beginning in 1963, my first 20 years were spent at David Starr Jordan High School in the Watts community. This school (then a "black school") has rich history. It was this school (via the NAACP '63 Crawford Case) that brought "school busing" to the city of Los Angeles.

It was this school that was used as the blueprint for "special programs" for "special students" at "special schools" - Elementary and Secondary Education Act (ESEA) - throughout America, following the 1965 Watts Riots.

Beginning in 1985, and since, I have been a classroom teacher at Bell High School. The school's enrollment has been majority Hispanic (all-inclusive identification for Cubans, El Salvadorans, Guatemalans, Mexicans, and Nicaraguans). Currently, the school is over 98% Hispanic.

In 1960, I received a Bachelor of Science in Business Education from Texas Southern University (the former Texas State College for Negroes), Houston, Texas.

In 1973, I received my Master of Science in School Management from Pepperdine University, Malibu, California. In between these years, I studied at UCLA.

When it comes to the effects of "preferential" laws on America's public school children; certainly, my training and my experiences give me as much credentials as anyone who professes to speak with authority for "minority" students.

Again, I "thank you" for the opportunity to do so.

We recognize and applaud the efforts of Congress to "answer to the needs" of the "minority" students. We wish to offer some suggestions on how best to do so; while at the same time answering to the needs of "majority" students as well.

I. ELIMINATE ESEA'S "PREFERENTIAL" TREATMENT OF K-12 STUDENTS:

Categorizing children into "special" groups causes for unhealthy competition between students and negatively impacts their learning environment.

Special, in the sense of qualifying for "preferential" treatment, singles out "minority" children as being "poor," "impoverished," "disadvantaged," "ghetto," "barrio," "urban," "at-risk," "welfare" students.

Think, for a moment, of your school days, of being teased. How many of us were not? Imagine having to wear labels because of where you lived -- "inner city-urban ghetto," or how much money your parents made -- "economically depressed," or just maybe you might be prone to violence -- "at-risk."

Children, by nature, have a tendency to tease each other. The vast majority of our children are good-natured about it (all part of "growing pains"). It is very difficult to be good-natured, however, when cause for the teasing is inflicted by one's own government.

Despite all the efforts of the Education Establishment's "self-esteem" classes, meetings and seminars for "minority" students, unless we remove the "Scarlet Letter" (or what the students see as their "dumb" label disguised in political terms), "self-esteem" will continue to be hard to come by.

ESEA accords "minority" children "preferential" treatment by awarding more taxpayers dollars for their education than given to "majority" children. By 1989, "minority" students were receiving \$5.4 billion more per year than the "majority" students.

The prime objective of ESEA was to bring reading levels of the "minority" students up to that of the "majority" students. Some three decades, additional funding, and special programs later, the most recent assessment of reading skills show reading levels for both the "majority" and the "minority" students leave much to be desired (EXHIBIT 1).

Government enforced "preferential" treatment has also bred an unhealthy and dangerous environment at schools where "cultural" celebrations are in fierce competition. "Dissing" (disrespecting) one's "culture" is one of the main reasons (second to gangsterism) for violence on our public school campuses (EXHIBITS 2-6).

It is incumbent on an American Congress to recognize the duty and need for teachers to teach American culture in our American public schools. Both Audie Murphy and Jesse Owens were American heroes; not an Anglo role model for "majority" children, not a Negro role model for "minority" children. Both men were role models for all America's children.

While an attempt to recognize each and every culture of children attending American public schools may be a noble gesture, it reinforces inferior feelings among "minority" students and introduces second-class status to "majority" students.

Various media interviews with black gang members always get the same answer to the question, "Why did you become a gang member?" No matter the gang or its degree of violence, the answer is, "I wanted to belong."

When it comes to "belonging," the black "minority" student is at a loss as to his "culture." There are American public schools teaching the black "minority" student that his is an African culture, but such cannot be defined. Africa is a continent with many countries each with its own culture. The black student is not familiar with which country the culture he is learning is associated (or, indeed, if such a culture actually exists).

Given the proximity of Mexico to California, it is only natural that in the "Hispanic" schools, the largest number of students enrolled is Mexican. Despite each country identified as Hispanic having its own culture, it is the Mexican culture that is celebrated in Hispanic schools.

"Banda" (Mexican) music being played at lunch on a Hispanic school campus (EXHIBIT 7) not only caused a "culture" clash between Mexicans and other Hispanics but it also played out to be a "culture" war between citizen ("majority" and "minority") students against non-citizen students.

Following this student's expression of his First Amendment right to freedom of speech, he was threatened, chased, beaten and then told by the school's administration not to return to the school. This student (an American citizen) had committed the political sin of "dissing" the culture of a foreign national.

II. ELIMINATE "RACE-BASED" GOVERNMENT FUNDED SCHOLARSHIPS

According to a recent Los Angeles Times article (EXHIBIT 8), "'Race-targeted scholarships' . . . are found at two-thirds of the nation's colleges and universities. . . based on . . . race or ethnic heritage. . . ."

Responsibility of the American taxpayer and the right of children are represented in a

"quality" public school education from Kindergarten through grade 12 (ages 6 to 18).

Transforming our public schools from "socialist training camps" to "academic learning centers" would go a long way to providing our society with an alert, law-abiding, civic-minded, productive citizenry with or without a college education.

The greatest advantage of a college education (arguably) is greater income, a feat obtained by many who only completed high school as their formal education.

"Learning is not easy, but it sure is worth it." Causing our children to believe otherwise, should not be a function financed by the American people.

These proposals may seem harsh, but now more than ever, our children need "tough love."

Reading Skills Lagging in State and Across U.S.

By RICHARD LEE COLVIN
TIMES EDUCATION WRITER

A new federal assessment of reading skills released Thursday contained a hefty dose of bad news for the state and the nation, showing that two-thirds of American high school seniors do not read well enough to handle challenging tasks and that California's fourth-graders rank last—tied with Louisiana—compared to their peers in other states.

The so-called Nation's Report Card tested students in three grades in 39 states and found that only a quarter of the fourth-graders, 28% of the eighth-graders and slightly more than a third of the seniors nationally were proficient in reading, meaning they are able to competently handle challenging texts.

Only a handful of students—between 2% and 5% depending on the grade—were reading at advanced levels, according to the National Assessment of Educational Progress, which tested 130,000 students across the nation last year to measure how well public and private schools are teaching a wide range of reading skills.

Nationwide, more than half the students at every grade-level tested were reading at only a basic level or below.

In California, nearly 60% of the fourth-graders—the grade at which experts say students should have learned to read and must use reading to learn other subjects—were found to have less than even basic skills, preventing them from gaining even a superficial understanding of most texts.

U.S. Secretary of Education Richard W. Riley said he was "disappointed by the lack of improvement" in the national scores, which showed little change from 1992 among fourth- and eighth-graders and dropped several points among high school seniors.

"These . . . findings indicate we have a long way to go to equip our students with the tools they will need for success in the next century," Riley said in a statement released in Washington.

California Gov. Pete Wilson was unequivocal in calling the scores "deplorable and inexcusable," and

he said the state's "education Establishment has taken our children over the cliff."

He called on the state Board of Education to "take a serious look" at new reading textbooks proposed for state approval to make sure that they "have a strong emphasis on basic reading skills."

"The results were particularly humbling for California, which educators nationwide have looked to for leadership in reading instruction since the late 1980s, when the state embraced progressive theories of how children learn to read."

The approach endorsed by the state's school board and Education Department stressed the importance of exposing children to engaging stories, but resulted in the de-emphasizing of basic skills such as phonics and spelling.

Now, California educators are understandably embarrassed and concerned that the state, one of the nation's richest and most technologically advanced, remains tied with or behind such largely poor and rural states as Louisiana and Mississippi. Mississippi was one of only two states where scores increased significantly from 1992, and California was one of 10 states where the 1994 results were worse than two years earlier.

State schools Supt. Delane Eastin said the results were "most depressing" and provided more confirmation of what the state's own academic test showed earlier this month, "that our students are not learning to read well enough."

"In anticipation of the poor showing on the two tests, Eastin appointed a 24-member task force earlier this month to examine every element of reading instruction in the state. That panel is to conduct its first meeting next week and issue a set of recommendations by the end of summer."

"The real question for California and for America is, do we have the courage to face these results honestly and do something?" Eastin said.

Tommie Hutto, a spokeswoman for the California Teachers Assn., the state's largest teachers union,

said it was unfair of Wilson to blame the low scores solely on educators. "There are a lot of things going on that teachers have no control over," she said. "What's happening in education in California is the result of the systematic lack of funding that we have had over the past several years. We are reaping the results of neglect."

California ranks near the bottom among the 50 states in per-pupil spending on education, and its average class size is the largest in the nation.

But Maureen DiMarco, Wilson's top education adviser, said the reading scores cannot be blamed on such outside factors. Instead, she said, the fault lies squarely with the state's move away from teaching children using phonics and other basic skills at the lower grades.

"California made a horrendous mistake in taking out the phonics and the basic decoding skills from our reading programs, and when you do that kids aren't going to learn to read anywhere well enough, if at all," she said.

A survey that was part of the 1992 NAEP results—in which California fourth-graders also came in near the bottom—found that the state's teachers were far more likely than their counterparts in any other state to believe in the so-called whole language approach to reading.

But California school districts and teachers in recent years have become increasingly concerned that the state may have gone overboard in pursuing that method, and have begun deliberately restoring phonics and other skills fundamental to reading fluency to the curriculum.

"Teachers need to be allowed to use an eclectic approach that isn't one extreme or the other," said Patty Abarca, a third-grade bilingual teacher at Heliotrope Avenue School in Maywood who believes in teaching good stories as well as basic skills. Abarca said her school has no spelling or grammar books and she is pressured by administrators to downplay phonics instruction.

But Norma Ramirez, who trains reading teachers for the Los Angeles County Office of Education, said the whole language approach

EXHIBIT 1

ONE

criticized by DiMarco "has not even been implemented" in the state and it would be a mistake to give up on it and go back to the phonics-based approach.

The NAEP test measures students' ability to perform a variety of reading tasks, including understanding the plot of stories, gaining information from texts and using written material to learn how to do something.

Reading scores on the national exam have remained largely unchanged since the 1970s, while math scores have improved slightly. Mathematics was not part of the 1994 assessment. State-by-state comparisons did not begin until 1990.

In the past, scores were reported only as national averages, based on a 500-point scale. Beginning in 1992, NAEP also began to relate those scaled scores to objective performance standards, to determine what percentage of students are at each of four levels: advanced, proficient, basic or below.

In 14 states, including California, the average fourth-grader exhibited a less-than-basic level of understanding, meaning that they had missed out on fundamentals essential to learning.

The states with the highest average fourth-grade scores among the 39 that participated in the voluntary assessment were Maine, North Dakota, Wisconsin, New Hampshire and Massachusetts; among the states near the bottom were South Carolina, Mississippi, Hawaii, Louisiana and, bringing up the rear, California. Only the island of Guam, where students also took the exam, came in lower.

NAEP officials urged caution in reaching sweeping conclusions based on the state-by-state comparisons, saying that the results do not take into account socioeconomic and demographic differences.

Yet even with those cautions, California's performance seemed to fall clearly behind that of other states. For example, a higher percentage of the California students who took the test did not speak English fluently. Yet, even when the state's showing is broken down by ethnic group, its performance was poor.

Nationwide, 49% of white high school seniors and 30% of Asian Americans were proficient readers while only 12% of African American and 18% of Latino students reached that level.

But the average score of California's white fourth-graders, which fell by seven points between 1992 and 1994, ranked them last among

the 39 states. Among black and Latino fourth-graders, the scores were also at or near the bottom compared to those groups of students in other states.

"Whatever the problem is, it is not a problem of the racial composition in the state," said Lawrence Feinberg, assistant director of the National Assessment Governing Board, which monitors the NAEP test. "It really is the deterioration of the performance of the white students that brought the state even lower."

How the States Compare

California readers ranked last among 39 states that participated in the National Assessment of Educational Progress. Here are the average scores by state for fourth-grade students. The national average score was 213 out of a possible 500.

Maine	229
North Dakota	226
Wisconsin	225
New Hampshire	224
Massachusetts	224
Iowa	224
Connecticut	223
Montana	223
Wyoming	222
Nebraska	221
Rhode Island	221
Indiana	221
New Jersey	220
Minnesota	219
Utah	218
Missouri	218
Pennsylvania	216
North Carolina	215
Colorado	214
Virginia	214
West Virginia	214
Washington	214
Tennessee	214
Texas	213
New York	213
Kentucky	213
Maryland	211
Arkansas	210
Alabama	209
Georgia	208
Delaware	207
Arizona	207
Florida	206
New Mexico	206
South Carolina	205
Mississippi	203
Hawaii	202
Louisiana	198
California	198

National Assessment of Educational Progress

June 8, 1990 LA Times

Violence, Racial Ills on the Rise in Schools

■ **Education:** L.A. board hears a grim assessment of conflict spawned by increasing cultural diversity throughout the district.

By SANDY BANKS
TIMES EDUCATION WRITER

Plagued by reports of increasing racial tension and violence on campuses, the Los Angeles school board met Thursday to hear officials describe conflicts wrought by the district's mushrooming cultural diversity.

The hearing was sparked by reports of racial incidents, ranging from swastikas painted on the walls of a San Fernando Valley school to fights between Latino and black students on a high school campus in Watts.

"The conflicts are not just in a few schools, but districtwide," Arlene Matsuo, head of the district's Multicultural Commission, told the board.

At some schools, such as Sunland's Mount Gleason Junior High, racial tensions are exacerbated by developing gang rivalries and by conflicts between neighborhood and bused-in students, officials said.

"My staff is afraid," said Principal Patricia Joe. "There is minimal positive instruction going on right now."

On other campuses, such as Jordan High School in Watts, the confrontations erupted between black and Latino students, separated by language and culture and sharing a campus that has changed rapidly from predominantly black to overwhelmingly Latino.

The Los Angeles Unified School District, the nation's second largest with more than 610,000 students, speaking more than 80 languages, has changed dramatically in 25 years. Enrollment has changed from 56% white in the mid-1960s to more than 85% minority—61% of that Latino—today.

Schools in inner-city areas, once predominantly black, have become primarily Latino or Asian as immigrants have moved in. The resulting tensions are often rooted in the fact that the students cannot speak one another's languages, officials said.

Many South Bay, Westside and San Fernando Valley schools that were virtually all white 25 years ago, now find white students a tiny minority. Their neighborhoods have changed from white to Latino, and the district has filled the schools with busloads of minority students from overcrowded inner-city campuses.

A recent Los Angeles County Human Relations Commission study found that the level of racial tension and misunderstanding among Los Angeles students is higher than in the general community, in part because of a growing intolerance of immigrant students.

At some schools, such as Madison Junior High School in North Hollywood, the immigrant groups

have faced off. There, fighting between Latino and Armenian students reached such a level this spring that groups of Armenian parents stormed onto the campus, protesting that they feared for their children's safety.

While Los Angeles schools had an active multicultural education program during its mandatory desegregation program a decade ago, board members admit the district has done little recently to head off the mounting problems.

"You think these battles have been fought and won and that they stay won, but what this is telling us is that . . . we need a constant and consistent effort" to fight racial intolerance, said board member Rita Walters.

SOUTHLAND NEWS

Assembly on Cultural Unity Erupts Into Racial Brawl

■ **Education:** Five students are hospitalized and 20 others are hurt after fighting breaks out between about 400 black and Latino students at Gardena High.

By KIM KOWSKY
TIMES STAFF WRITER

GARDENA—Five students were hospitalized and at least 20 others suffered cuts and bruises Thursday when a school assembly held to promote cultural harmony dissolved into widespread fighting among scores of black and Latino students at Gardena High School.

The brawl erupted on the lunch patio about 12:30 p.m., just moments after the final curtain was drawn on the school's annual International Assembly, which included music and dancing from more than 20 nationalities and cultures.

The fighting, which school police said involved about 400 students, continued in sporadic bursts for nearly an hour, even after more than three dozen police officers from the Los Angeles Unified School District, Gardena and Los Angeles police departments arrived.

Five students were taken to Memorial Hospital of Gardena with injuries ranging from cuts and bruises to a possible concussion. All were in stable condition and expected to be released by the end of the day, said hospital administrator George M. Rooth. Among those hospitalized were a girl who had fainted and a boy who had suffered a seizure.

No arrests were made.

Although school officials denied that any weapons were involved, at least one student, Au-Trese

Patterson, 15, said she had been stabbed with a knife in the knee. She was treated by the school nurse.

The fighting was blamed on everything from campus overcrowding to racial tensions among black and Latino students. The school was reorganized this year to begin accepting ninth-graders, boosting enrollment by nearly one-third. About 40% of the school's 2,800 students are black, 35% are Latino and 15% are Asian.

Social studies teacher Maureen O'Donnell, a representative of the United Teachers of Los Angeles, said teachers have been complaining since August that the school needs more counselors and support staff to handle the additional students, but that their concerns were not heard. As a result, she said, the students have been "difficult to control."

"The wonder of it all is not that this thing happened, but that it didn't happen sooner," O'Donnell said. "It's been chaotic here from Day One and we've been racking our brains to see what we can do about it."

School Board President Warren Furutani said there is no doubt that as a result of state and local budget cutbacks classes are larger and the

teaching and support staffs have been reduced. However, he said, crowding alone did not spark the tumult at Gardena.

The conflicts between black and Latino students, Furutani said, cannot be "predicated on just class size [It is] predicated on the issue of what is going on all over the city."

A similar incident between black and Latino students occurred recently at Chatsworth High School, he said. And tensions had been evident previously on the Gardena campus, he said. The National Conference of Christians and Jews has a brotherhood and sisterhood camp on the Gardena campus.

The brawl was foreshadowed during the assembly, which featured a pageant of students modeling costumes from various cultures. Large groups of black and Latino students began cheering loudly for their own cultures but not for those of others. It wasn't until the students filed onto the patio for lunch recess, however, that the fighting began.

Black and Latino students accused each other of sparking the fights by failing to show enough respect for the music and dancing of their respective cultures during the assembly.

"The Mexicans were showing disrespect," Letoya Pettus, 14, who is black, said on the school's front lawn. "They began shouting 'Meo-co' while our people were danc-

ing . . . It started a riot a everybody just started hitting, punching and kicking."

But Latino student Miranda Fvas, 16, said it was the other way around. "They [black students] always agitating fights with the Mexican people. When we want to celebrate our culture, they put down."

Principal Catherine Lum said was an oversimplification to describe the fighting as "a black brown confrontation."

"We have tried very hard to build good race relations," Lum said. "I can't believe that something that is meant to improve relations could be the cause of this. I think the problem is a lot of misguided enthusiasm."

Investigators with the district Police Department are trying to determine whether gang rivalry sparked the melee, she said.

Officials said they will not cancel a series of multicultural events scheduled for the Gardena campus throughout the week, but will have additional security today.

Times staff writers Michele Fuets and Lisa Omphroy contributed to this report.

n L.A., 3rd day of school racial brawls

Jonathan T. Lovitt
Special for USA TODAY

LOS ANGELES — Racial fighting between black and Hispanic students erupted for a third consecutive day Wednesday as officials scrambled to restore order.

"We're just trying to get things on an even keel," says School Superintendent Sid Thompson. "When students see other students fighting on TV, they're bound to carry over." On Monday, several hundred North Hollywood High students clashed at lunchtime,

and riot police were called. On Tuesday, about 30 Hamilton High students fought at recess. Two were hurt.

And on Wednesday, Olive Vista Junior High students brawled. Two were hurt, one seriously. Officials sent most of the students home early.

"Mexican kids started spitting on the blacks," says Clarence Davenport, 13. "Everybody started fighting and running."

Randy Pearson, 36, father of Davon Pearson, 13, a student, is worried the fighting could erupt into something more.

"The Mexicans are running

the blacks out of the school," he says. "This is only the beginning. There's gonna be race war. There's too many Mexicans and not enough blacks to fight them off."

But Johnny Franco, a Hispanic student, says he was hit in the head with a bicycle lock thrown by a black student.

"Some black kids started shouting racial slurs," he says. "The black kids started it."

Olive Vista's 1,750 students are 80% Hispanic; 5% black.

The issue hits a district already troubled by a \$400 million deficit and the threat of a

teachers' strike.

"The kids have picked up on the tenor of the times," says Olive Vista Principal Charles Baldwin. "Their parents are going through tough economic straits. The kids are taking it out on each other."

The district has beefed up security and peer counseling.

"We want teachers to ... try to talk some sense to them," Thompson says.

Adds Mary Anne Diaz of Community Youth Gang Services: "Someone has to tell these brown and black kids they shouldn't be fighting."

OCTOBER 29, 1992 • USA TODAY

EXHIBIT 4

Letters to The Times

Racial Unrest in L.A. Schools

■ North Hollywood High School principal Catherine Lum is living in a dream world, as she fails to see the animosity between blacks and Hispanics, not only in school but throughout society (Oct. 28).

As a black American, I am stunned by the insensitivity of white America. Race conflicts will increase with time due to this country's blind immigration policies. We are flooded with minorities and the interests of America's former slaves have been effectively pushed aside. And blacks must compete with newcomers from around the world for scarce resources, which get scarcer all of the time. Our myopic immigration policies have no relation to what we should be doing: decreasing immigration, not increasing it! Racial conflict is, thus, inevitable and guaranteed.

As cowardly politicians shy away from the controversial immigration issue, we come closer to our own version of Yugoslavia. The tragedy: America refuses to address this racial time bomb waiting to explode. Unless the deaf government, which pretends to represent us, awakens to the danger and inevitable societal chaos of our present path, the downfall of America will, like that of the Soviet Union, be more a product of its own internal moral bankruptcy than to any outside threat, whether real or perceived.

REUBEN VAUGHN GREENE III
Los Angeles

■ The riot police have encircled our campus. They are wearing helmets with face masks and carrying billy sticks. Overhead is a whirring helicopter that circles incessantly. And we teachers have been informed to keep our students in class, out of the halls and employ a program that is educationally sound.

The students? They want to hang out the windows, see and hear what is going on in the yard and on the street. What excitement! Learning? "Please open your books." "Nah, I don't feel like it."

This is not an environment to learn—to probe the unknown—to gain an education. This is an environment of camaraderie, subterfuge and rebellion.

The riot police? They cannot change attitudes or produce a shift in racial tension. Only the students themselves can do that. But frankly, Scarlett, they don't give a damn.

DIANNA LEE DAVIDSON
Van Nuys

■ Rash or violence has broken out in our local high schools. Why not have the movie studios, the television production companies, and the corporate sponsors of television programs that both glorify violence and desensitize our young people to its use foot the bill for needed rigorous security staffing and metal detectors?

They profit by it; let them pay for the results of it.

MARGO SORENSON
Irvine

■ Let's predict the future.

Due to the dramatic increase in violence on school campuses the Los Angeles Unified School District will employ numerous consultants to figure out the solutions to the problem. All of these consultants will be former district administrators who took early retirement. These consultants will call for the hiring of hundreds of more police officers, the installation of metal detectors at the entrances to each campus, and the purchase of millions of dollars worth of surveillance equipment.

These consultants will also recommend that the LAUSD set up an office of student race relations and violence suppression headed by yet another junior assistant associate deputy under superintendent of instruction with his/her countless underlings affectionately referred to as "support staff."

Of course, next year teachers in the LAUSD will be told that, due to the increased cost of security, they will not receive any pay raise and, in fact, will see their salaries cut for the third year in a row.

And the public will wonder what teachers mean when they say they're tired of subsidizing public education with their paychecks.

LOU COHAN
South Gate High School

EXHIBIT

Students, Police Clash at Protest

By MATT LAIT
and DAVID AVILA
TIMES STAFF WRITERS

FULLERTON—A crowd of about 300 high school and college students clashed with police near Fullerton College on Thursday, when a demonstration demanding more Chicano studies classes in the schools turned violent, leaving several students slightly injured and leading to six arrests.

Police officers, some clad in riot gear, used pepper spray to quell the students, who had been using Mexican Independence Day observances as a symbolic springboard for their protest.

But the protesters decided to take to the streets near the school about 1:30 p.m. and blocked traffic on Lemon Street, police said. The students ignored orders from Fullerton officers to disperse, authorities said.

A short time later, 60 backup officers from neighboring police departments arrived to help Fullerton officers, who arrested six demonstrators considered to be the instigators of the disturbance, police said.

Fullerton police spokeswoman Sylvia Palmer Mudrick said the students, angry over the arrests, started yelling and threatening the officers. "Rather than using deadly

Continued from A3

force, our officers used pepper spray to control the situation," she said.

The protesters said they were not looking for a confrontation and contend that they were only trying to follow the officers' orders when they were attacked with chemical spray and batons.

"We were just marching by the street, and an army of policemen swarmed us," said Rosa Romero, 19, a Fullerton College student. "They started macing people and hitting them with their sticks. I saw one girl get maced right in the eyes, and people were stepping on her."

Several students, who were milling about after the police waded into their midst, had bloodstains on their clothing and were coughing and rubbing their eyes in reaction to the gas.

David Rojas, 21, said the students "made it clear we didn't want any violence."

"When we saw the police forming, we began to lock arms and march slowly," he said. "One [police officer] tried to grab one of the guys, but we locked arms. They pulled so hard that several of us fell down, and they began macing us and hitting us with their sticks."

Earlier in the day, about 270

students from Anaheim High School and Sonora High School in La Habra had staged a walkout aimed at highlighting the lack of Latino teachers at their schools and the absence of any classes on Chicano subjects.

The students marched to Fullerton College to join a rally commemorating Mexican Independence Day with ancient Aztec dances, music and speeches. Apparently, it was at the request of one speaker that a march be held around the streets near the campus.

Fullerton College Public Safety Officer Phil Montano said the event was orderly before the speeches.

"People were voicing their opinions and everything was fine," Montano said. "The reason why this happened is they [the protesters] left the campus and blocked the street. It's not because they're Mexican."

Fullerton College President Philip Borst said the melee took him by surprise. "Apparently our [Latino students] invited the high school kids to the college so they could see what it is like," he said. "We had an orderly celebration."

Times staff writers Terry Spencer, Mimi Ko, Jon Nalick and Greg Hernandez contributed to this story.

EXHIBIT 6

Bell Chimes



VOLUME 65 NO. 4

June, 1993

PAGE 2

BANDA MUSIC AT BELL HIGH SCHOOL

By: William McKenzie

Recently during lunch time Bell has been playing Mexican music, better known as Banda; also Bell has been having Banda dances during lunch. Bell High is located in the city of Bell in L.A. California not in T.J. or some part of Mexico. If music is to be played it should be in English not Spanish. People who like dancing to Banda and like hearing Banda music can do that on their own time at a Hispanic club or in Mexico since Spanish is Mexico's national language. I do not think that its right to play Banda music at school;

what people do after school is their choice. There is no problem in that, except our school is not in Mexico so that music should not be played. So

lets have more of a variety of music during lunch like Heavy Metal or Rap. The major point is respecting our nation and our school, Bell High is an American school; there is not even an American flag



in every class room throughout Bell High. Bell High does not even recite the Pledge of Allegiance in the morning; what's this country coming to? It seems that no one has the American spirit any more.

Response to Banda Article

By Jose Silarlochilt

The comments made in Brian McKenzie's "Banda story" is one of the most racist and idiotic articles this paper has ever published. Of course they are going to play Spanish music because it gets a bigger response than all the other music. For example, there was a live band here a while back, but it didn't produce the crowds that Spanish music produced. Spanish music also helps bring people to participate in the festivities. However I do know there are a lot of people who don't like Spanish music. That's O Kay, nobody is saying they have to participate or listen, they can just go some where else like the west quad. Who's going to bother them there? If they don't like it why don't they move to Bakersfield or where ever you Banda opposers prefer, but don't expect us to go anywhere.

EXHIBIT 7

Race-Based Scholarship Ban Allowed to Stand

Los Angeles Times

* TUESDAY, MAY 23, 1995

■ **Education:** U.S. high court rejects university's appeal. Ruling is seen as a setback to college affirmative action.

By DAVID G. SAVAGE
TIMES STAFF WRITER

WASHINGTON—In a setback for college affirmative action, the Supreme Court on Monday let stand a ruling that bars the University of Maryland from restricting some of its scholarships to black students.

The outcome in this closely watched case threatens the "race-targeted scholarships" that are found at two-thirds of the nation's colleges and universities.

While most scholarships are based on merit and need, about 5% of undergraduate aid and 10% in professional schools is limited to certain students based on their race or ethnic heritage, according to a General Accounting Office survey.

The University of Maryland said its Banneker program, which offered 30 to 40 black freshmen all-expenses scholarships, symbolized its commitment to overcoming its history of excluding blacks. In 1930, Baltimore-native Thurgood Marshall, who later was to sit on the Supreme Court, was barred from applying to Maryland's law school because of his race.

But last year, in the first decision on the issue, a federal appeals court ruled that a scholarship program limited to blacks denies white students equal protection of the laws.

"Racial classifications cannot be rationalized by the casual invocation of benign remedial aims," wrote a three-judge panel of the U.S. 4th Circuit Court of Appeals. The ruling dealt only with racial issues, not with scholarships based on gender or other criteria.

The Clinton Administration, the NAACP Legal Defense Fund and a coalition of major colleges and universities joined the University of Maryland in urging the high court to grant the appeal and to reverse the ruling. They said the ruling, if allowed to stand, would undercut minority scholarships across the nation.

But without comment or dissent, the justices rejected the university's appeal in the case (*Kirwan vs. Podberesky*, 94-1620).

The action by the high court is not binding. Because the justices

can freely choose their cases, a refusal to hear an appeal does not formally uphold the lower court decision.

However, the court's refusal to even hear Maryland's appeal, especially after the Justice Department said that it raised an issue with national implications, strongly suggests that a majority of the justices do not dispute the lower court's conclusion.

The appeals court decision relied on a 1989 Supreme Court ruling in a Richmond, Va., case that said that the use of racial classifications by state and local governments is rarely acceptable. Even though the city of Richmond, once the capital of the Confederacy, clearly had discriminated against blacks in the past, that history does not justify discrimination in favor of blacks today, the court said in the case of *Richmond vs. Croson*.

The same is true in the Maryland case, the appeals court said. While blacks were excluded from the university until 1954, they make up 11% of the student body today, the court noted.

Recently, the federal courts have relied on the 1989 ruling to strike down various forms of official affirmative action, including city laws that reserve some contracts for blacks and Latinos.

Still pending before the high court is a major challenge to affirmative action programs authorized by the federal government. A white contractor is contesting a federal highway program that steers some contracts to minority-owned firms. A ruling in the case of *Adarand Constructors vs. Peña* is expected by the end of June.

While the Maryland case may call a halt to scholarship programs that exclude some students based on their race, the ruling does not concern financial aid programs that give an edge to minority students.

But the ruling is likely to end a legal controversy that has festered for five years.

In 1990, lawyers in the George Bush Administration told higher education officials that scholarships directed to only minorities were illegal. However, that announcement set off a political uproar and the White House backed

down. It ordered Education Department officials to study the matter.

Soon after President Clinton took office, Richard W. Riley, his secretary of education, announced that "race-targeted scholarships" were legal, either as a means to "remedy past discrimination" or to "achieve a diverse student body."

But Washington Legal Foundation, a conservative law center, decided to challenge that conclusion in court.

In 1990, Daniel J. Podberesky, a Maryland freshman, was told he could not apply for a Banneker scholarship even though he had a 4.0 grade point average and a 1340 score on the Scholastic Aptitude Test. The student said he was "Hispanic" because his mother is from Costa Rica. But his application was denied because he is not black.

Podberesky is now a first-year medical student and his lawyers said he is owed the \$35,000 in scholarship aid that he was denied over the course of four years.

"I believe this case will have positive national implications," said Richard Samp, chief counsel for the Washington Legal Foundation, who represented Podberesky. "From the beginning, this case has been clear-cut: publicly funded academic scholarships awarded on a race-exclusive basis are unconstitutional."

Administration lawyers argued that race-based scholarships are justified at Southern universities with a legacy of past discrimination.

Citing earlier rulings in desegregation cases, the Justice Department argued that formerly segregated universities "have an affirmative duty" to take whatever steps are needed to dismantle those systems.

But despite the department's view, the justices refused to even hear the appeal.

EXHIBIT

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Mr. CANADY. Thank you very much for your testimony. It's been very helpful testimony. I think you've pointed to a real problem area and it's something that will be very helpful to us in our future deliberations on this subject.

Mr. Flanagan.

Mr. FLANAGAN. I have no questions, sir.

Mr. CANADY. Well, again, thank you for being here. We appreciate your taking the time. I want to express the gratitude of the subcommittee to all of the witnesses who testified today. Your testimony will be of significant assistance to us as we move forward in addressing these issues.

Ms. FOSTER. It will be a little remiss of me not to comment on the statements regarding slavery.

Mr. CANADY. You certainly are free to comment.

Ms. FOSTER. Those of us who participated in the civil rights movement, of which I was one, did so not because we wanted revenge on a majority society, not because we wanted revenge against another people, we did it because we wanted segregation laws removed. In other words, we wanted obstacles removed. We didn't ask for obstacles to be put before the path of other races, and I think that needs to be clarified.

And there's nothing we can do about slavery. It happened, it's over. America did the right thing by including in her Constitution that all of us are citizens and I think if we stick to that Constitution and stop coming up with all of these laws to appease one against the other, we'd do a lot better for all of us.

Thank you.

Mr. CANADY. Well, thank you very much. The subcommittee is adjourned.

[Whereupon, at 11:33 a.m., the subcommittee adjourned.]

GROUP PREFERENCES AND THE LAW

WEDNESDAY, OCTOBER 25, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:31 a.m., in room 2237, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Bob Inglis, Michael Patrick Flanagan, Bob Goodlatte, Barney Frank, Melvin L. Watt, José E. Serrano, and John Conyers, Jr.

Also present: Representative Sheila Jackson Lee.

Staff present: William L. McGrath, counsel; Jacqueline McKee, paralegal; Mark Carroll, staff assistant; and Robert Raben, minority counsel.

Mr. CANADY. The subcommittee will come to order.

I'd like to welcome the witnesses who are with us here today for this hearing. This hearing marks the fifth time this subcommittee has addressed the general topic of racial and gender preferences. We held a hearing here in April, followed by a field hearing in San Diego, CA, in June. More recently, we've had two oversight hearings that focused on this topic, one in July and a joint hearing with our Senate counterparts in late September. We continue our investigation of this important topic today.

The topic of today's hearing is the economic and social impact of racial and gender preference programs. As I am sure everyone knows, President Clinton has expressed his wholehearted support for the status quo in this area. The President has determined that "affirmative action works," and I quote him there. And by that, the President means that race and gender preference programs are beneficial, and the President has committed to preserve these programs to the maximum extent possible.

The announcement Monday by the Pentagon that it would suspend one particular administrative program that causes certain contracts to be set aside for minority firms is consistent with the President's theme: "Mend it; don't end it."

Outside of the administration, however, there appears to be strong support for moving away from the practice of government treating citizens differently based on race and gender. The broad coalition for change includes Republicans and Democrats, men and women, people of all races and ethnic backgrounds.

In the House, Speaker Gingrich has created a task force on equal opportunity chaired by Congressman Chris Cox and Congress-

woman Susan Molinari. The task force has been instructed to develop a unified approach to two distinct, yet related, topics: repealing racial and gender preference programs and enacting a comprehensive empowerment package that will break down barriers to opportunity for all segments of our society.

Our hearing today is designed to assist members in understanding the impact of racial and gender preference programs on minorities and women, on relations between the races and the sexes, and on American society generally. We have assembled two distinguished panels of witnesses today, and I look forward to hearing the testimony of all the witnesses.

And I'd like to now ask our first panel to come forward, and I'll recognize Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman.

I regret to say that this seems to me continuation of a pattern in which this Congress, under its current leadership, focuses on criticizing efforts to alleviate programs while ignoring the problem. It is certainly legitimate to look into the effects of affirmative action, the extent to which it ought to be changed. Particularly in light of the Supreme Court opinion in the *Adarand* case, obviously, things have to be changed some.

But there continues to be a pattern of our subcommittee and others in this institution looking only at efforts to deal with the underlying program and never to look at the underlying problem. The underlying problem here is racism. No one familiar with the facts denies that racism has been one of the most serious continuing problems of this society. I think we have made a great deal of progress in confronting it, but it seems to me a great denial of the facts to say that racism is no longer a problem.

I can recall no hearings in this Congress on the problems of racism, on whether or not we have unequal justice in some city police departments where officials are violating the law, whether or not there are other continuing examples of people being treated unfairly because of their being members of the minority race.

In other words, we focus on problems with the efforts to resolve this, but we never deal with the solution itself. Now human beings, being what they are, society being as complex as it is, of course, there will be mistakes; of course, there will be error. But to ignore, as we have, the underlying problem seems to be a mistake. We have recently in Los Angeles and Philadelphia and elsewhere examples of racist behavior by police officers. We have problems continuing in a number of areas in our society.

We had a debate on the floor last week when we talked about disparities in sentencing with regard to use of different forms of cocaine and allegations by many Members that there were disparities in the selection of people to prosecute, and Members on the other side said, well, those are things that ought to be looked into. By whom? Certainly, apparently, not by us because we haven't been doing it.

So I look forward to this discussion of affirmative action, but I think the very fact that the question is, to some extent, posed as, is affirmative action causing the problem, get things exactly backward. Affirmative action certainly did not bring about racism in this country. Affirmative action is an effort to deal with the prob-

lems of racism and to criticize the well-intentioned efforts of many people to deal with the problems of racism, and not to deal with that problem itself seems to me to be a misdirection of our resources and shows a great misunderstanding of the actual problem.

Mr. CANADY. Mr. Hyde.

Mr. HYDE. I have no statement. Thank you.

Mr. CANADY. Mr. Serrano.

Mr. SERRANO. If I may say just very briefly, Mr. Chairman, I think that, with all due respect to you, it's proper to clarify some of your statements about the President's comments. Let me preface my statement by saying that, if I were the President, I would have made my statements about affirmative action exactly the way you said that he said them. However, he didn't say what you said he said; he, in fact, said that if there were programs that in any way were unfair, they should be dealt with. If programs, in fact, need to be reviewed, they should. While the President said he supported the general concept of affirmative action and felt that it was a good thing, where there was a problem, it should be dealt with. I repeat, if I was the President, I would have said it exactly the way you said he did, but that's not the way he said it.

Thank you.

Mr. CANADY. We'll move on to our first panel. On our first panel today we will hear from witnesses who will address the social impact of preference programs.

Our first witness, Prof. James Kuklinski, is with the Department of Political Science and the Institute of Government and Public Affairs at the University of Illinois. Professor Kuklinski has developed and conducted surveys on racial attitudes and perceptions.

Next we will hear from Mr. William Coleman. Mr. Coleman is a partner with the law firm of O'Melveny & Myers in Washington, DC, and has had a long and distinguished career as a lawyer. He has also previously served as Secretary of Transportation under President Ford.

The last witness for the panel, this panel, is Mr. Will Marshall. Mr. Marshall is the founder and president of the Public Policy Institute, a think tank based in Washington, DC. I'm sorry, the Progressive Policy Institute. My apologies to you.

We want to welcome each of you today. We are very grateful that you can be with us. We would ask that you confine your spoken testimony to no more than 10 minutes each. However, your full written statements will, without objection, be made a part of the record.

Professor Kuklinski.

STATEMENT OF JAMES H. KUKLINSKI, PROFESSOR, DEPARTMENT OF POLITICAL SCIENCE AND INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Mr. KUKLINSKI. Thank you, Mr. Chairman and members of the committee.

Let me begin first by saying why I'm not here. I am not here to argue for or against affirmative action. I am not here to say affirmative action has or has not worked as a program. I'm not here to offer some new policy initiatives, and I'm not here to demonstrate

that structural racism does or does not pervade American society. They're all important, very important, tasks, but they're really beyond my purview.

Rather, I'm here to share with you some findings that colleagues across the country and I have gleaned from two national surveys, one taken in 1991 and one in 1994, and several statewide surveys. So my discussion is limited to attitudes toward affirmative action, at least as surveys can measure them.

I must say at the outset that both of the national surveys are based on random samples of the Nation's adult population. Consequently, we do not have enough African-Americans in either sample to speak confidently about their attitudes. I will be reporting the attitudes of White Americans, which should not be construed as a lack of concern for attitudes of African-Americans. In fact, to the contrary, we're trying currently to get funding to do a survey of black Americans, but we must keep in mind that these are findings about white people's attitudes only.

Now there have been numerous surveys of racial attitudes and attitudes toward affirmative action. So what makes ours unique? The answer lies with two design components that are unusual and that we think can provide insights traditional surveys cannot. One, we have incorporated numerous experiments in the surveys, thanks to the availability of computer-assisted telephone interviewing. Let me best explain with a very simple example.

Suppose we have a random sample of white Americans and then randomly divide that sample in two. The first half is asked, "Do you favor or oppose affirmative action programs for African-Americans?" The other half is asked, "Do you favor or oppose affirmative action programs for women?" It's exactly the same statement except that the target group differs. And so, basically, then, what we can do is compare the two distributions of responses and determine whether the target group makes a difference.

In this case, for example, if opposition to affirmative action really is opposition to the program itself, then we should see no difference in distributions across the two versions. If we do, we would then conclude that the target group itself makes some difference.

There's a second design component that we think is especially unique and probably especially important. Over a number of years, I and various colleagues have been able to construct so-called unobtrusive measures of racial attitudes. The problem in traditional surveys is that respondents often may not express their true feelings out of fear of being labeled prejudiced. These are called social desirability effects, and they can have great consequences on the responses we get. Very simply, there's a very good chance that traditional surveys grossly underestimate the level of racial animosity in the United States. I won't go into detail on these methods; they're outlined to some extent in my written report.

Let me summarize the story that our data tell, and then I'll try quickly to dissect this story and look specifically at several selected aspects of it. The story, in short, is this: racial prejudice remains in 1995 a major problem in American society. When given a chance to say what they really feel, a significant number of whites express hostility toward black people. Tragic as this racial prejudice is, it alone cannot explain the intense and widespread hostility toward

affirmative action among whites, white adults. While prejudice explains part of the resentment toward affirmative action, an even larger factor is the feeling that affirmative action programs violate the American creed, specifically principles such as hard work, making it on your own, and the like.

The resentment toward affirmative action and the strong sense that it violates principles of fairness, moreover, are distributed quite equally amongst Democrats and Republicans and amongst liberals and conservatives. Within the American public, in short, affirmative action is not much of a partisan or ideological issue. Despite the hostile reaction toward affirmative action, a majority of white Americans, nonetheless, express a genuine concern for the plight of blacks and a willingness to put forth extra efforts in forums other than affirmative action.

Finally, it would appear that the very talk of affirmative action increases the use of negative stereotypes among whites. We all wish that such stereotypes did not exist at all; sadly, they do, and affirmative action seems to exacerbate an already serious problem.

I want to emphasize this is a story that emerges out of our survey data. Needless to say, the story is at best a small part—we think an important part, but a small part—of any thorough discussion of affirmative action.

Let me now turn more specifically to several aspects of what I just said. One question we addressed, which has been asked often, and should be asked often is this: does out-and-out prejudice underlie most of the hostility toward affirmative action? It is a very fundamental question to which we need to get the best answer we can. I will not go in, again, to the specifics of our measures here, but we think we've done a reasonably good job of answering this question. And what I can say is racial prejudice, again, remains a problem in the United States. Our estimates are we still have about one out of five whites who expresses anger, for example—not just opposition, but anger—over the idea of a black family moving in next door. Change the word to “oppose”—that is, ask people if they oppose the black family moving in next door—and the percentage actually increases. We have also looked at interracial dating and found somewhat the same kinds of percentages.

Now, be that as it may, prejudice alone does not explain all of the strong resentment to affirmative action. If we ask the same question on affirmative action—that is, does affirmative action make people angry—we find that well over 50 percent say yes; in fact, it's well over 55 percent. If we ask people if they oppose affirmative action, as I think many of you know, the percentage is really quite extremely high.

So we think prejudice, at least as we have tried to measure it, cannot alone explain the resentment toward affirmative action. What, then, underlies the antipathy? We have spent considerable effort to answer this question, and the research group as a whole has pretty much concluded that principles such as hard work, make it on your own, and so forth, are considered very important and affirmative action is seen as a violation of these principles.

Given that, it is also important to know that white Americans, quite overwhelmingly, are supportive of efforts to help minorities in forms other than affirmative action. To give you one very quick

example, we asked people if there should be preferences for blacks in admissions to universities. We found that about 25 percent said yes. We then asked our other half of the sample whether or not we should make extra efforts to help blacks get into universities, and there we found more than 60 percent said yes. We are inclined to believe that there is a lot of goodwill and a willingness to do what we can to help African-Americans.

Slightly more anecdotally, we did find, when we were doing one of our surveys, that many whites volunteered rather angrily to the publication, "The Bell Curve" book, and this in many cases was just voluntary. We also did a couple of surveys, given those voluntary responses, and found most white Americans were not at all taken with the idea proposed in that book that there was some kind of genetic inferiority.

Third, affirmative action outside the beltway has not been a partisan issue, certainly is not today. We find very little difference between liberals, conservatives, Democrats, and Republicans. We also discovered, interestingly, in our 1994 survey that people who call themselves liberal are really wrestling with the issue of affirmative action.

For example, we directly asked half of our sample: "Does affirmative action make you angry?" Thirty-nine percent of the liberals said yes; 59 percent of people who called themselves conservatives said yes. We then unobtrusively asked the same question of our other half of the sample and found that nearly 60 percent of liberals and nearly 60 percent of conservatives indicated that affirmative action made them angry.

What should we make of this finding? It certainly would seem not that liberals are being devious, but they, themselves, are having some difficulty with reconciling their attitudes toward affirmative action vis-a-vis their strong support of civil rights. I should mention as one aside in both surveys, contrary to what the media have reported, we found no evidence of a gender difference.

Let me make one concluding comment and then I'll stop, and that is I think we should refrain, strongly refrain, from making broad, sweeping generalizations. Those who argue that white prejudice motivates the hostility toward affirmative action are right, but they are only partially right, which means they are also partially wrong. Those who argue that a reaction to affirmative action is motivated by a genuine feeling that it is unfair are also right, but they, again, are only partially right, which means, again, they are partially wrong. So I think we need to be much more careful in making general comments about what underlies attitudes toward affirmative action.

[The prepared statement of Mr. Kuklinski follows:]

PREPARED STATEMENT OF JAMES H. KUKLINSKI, PROFESSOR, DEPARTMENT OF POLITICAL SCIENCE AND INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS, UNIVERSITY OF ILLINOIS AT CHAMPAIGN-URBANA

Dear Members:

Thank you for the opportunity to share some of my research findings with you. Being an academic, I feel compelled to begin with several introductory comments. I ask that you keep them in mind as we discuss the substantive research.

First, the research findings I will be reporting are the product of a community of scholars who have truly functioned as a research team. Other participants in the various studies include: Edward Carmines (Indiana University); Jonathan Hurwitz (University of Pittsburgh); Kathleen Knight (University of Houston); Thomas Piazza (University of California-Berkeley); Paul Sniderman (Stanford University and the Survey Research Center at the University of California-Berkeley); and Philip Tetlock (University of California-Berkeley). Most members of the team are political scientists. Piazza is a sociologist and survey research specialist and Tetlock a social psychologist.

Second, I take this opportunity to share some of our collective research findings, not to advocate a position on affirmative action or any other related program. Indeed, I will not publicly state a position. Proposing and debating legislation is a function that all of you will ably perform, I am sure. Nor by reporting our studies of public opinion do I mean to imply that legislative decisions should be based totally on what members of the general citizenry think. Representative government involves more than that.

Third, I intend to be as objective as possible in my presentation. There are two aspects of the research enterprise that often become intertwined: presenting data and interpreting them. To the extent I can, I will focus on the former. Of course, at times interpretation simply is necessary to make sense of the data.

Fourth, each of you will undoubtedly find something in the data that you like and something else you would rather not hear. I would ask that you not dwell on a single datum, but instead attempt to form an overall picture of racial attitudes and attitudes toward affirmative action.

Finally, two caveats about the research itself. One caveat applies to the nature of our respondents. I will be presenting findings on the attitudes of white Americans. Although the

attitudes of African-Americans are, of course, equally important, our surveys do not include a sufficient number to undertake a reliable analysis (our surveys are random samples of the national adult population). We hope to oversample African-American citizens in future surveys. The other caveat applies to our methodology. We believe that we have developed some techniques to measure sensitive attitudes that far outperform traditional surveys. I will describe some of them below. But no methodology is infallible. We have conducted numerous studies designed to ensure that our methods are valid and reliable; and we think they are. In our view, the methods we have developed are currently the best available to study racial attitudes. They may not be tomorrow.

Before turning to the substantive findings, I would like briefly to describe our methodology.

Experimental Surveys and Unobtrusive Measures

Within the last decade or so, the emergence of Computer Assisted Telephone Interviewing (CATI) has made it possible to imbed experiments within large surveys. A very simple example will help. Suppose we want to know whether people are more opposed to affirmative action programs for African-Americans than women. One-half of the total sample, randomly chosen, are asked, say, whether they strongly support, support, oppose, strongly oppose (or have no feelings about) affirmative action programs for African-Americans. The other half receive the same question, worded exactly the same way, except now the target group is women rather than African-Americans. By comparing the distribution of responses to the two questions, one can estimate how much difference the target group—African-Americans vs women—makes in overall support for affirmative action. Moreover, the researcher can also look at certain subsets of the population—liberals vs conservatives, men vs women, etc.—to see how their responses differ across the two target groups.

Suppose, for example, that we asked this question of a national sample and found that there was much more support for affirmative action programs for women than for African-Americans. Since both questions referred to affirmative action, and the only difference in wording is the target group, one might want to ask why different target groups lead to different levels of support for affirmative action.

We have also worked to construct measures of racial attitudes that are unobtrusive. Let me explain what, exactly, that last, horrible-sounding word means.

One way to ask about any sensitive attitude is directly to ask: "Do you favor or oppose interracial dating?" The problem, of course, is that the respondent might possibly be inclined to give the "right" answer rather than what he or she truly thinks. This is most likely to occur when the respondent really opposes (in this case) interracial dating but fears that offering this answer will make him or her look prejudiced. This phenomenon, called social desirability, has plagued survey research for decades. Consequently it has been difficult to say with confidence that one has identified the true distribution of racial attitudes for the nation as a whole.

We have put considerable effort and, we would like to think, some creativity into constructing questionnaire items that overcome the social desirability problem. That is, we have tried to

develop measures that allow respondents to say what they really think because they believe there is no way the interviewer can know what their true attitudes are. And this is indeed the case, although the analyst later can estimate what the responses were.

Let me give an example, using a measure that has played a central role in our two national surveys. Suppose we randomly divide the national sample into three subsets. The first group receive this question:

"Now I am going to read you three things that sometimes make people angry or upset. After I read all three, just tell me HOW MANY of them anger you. I don't want to know which ones, just HOW MANY."

With these ground rules established, the interviewer then reads a list of three items:

- (1) the federal government increasing the tax on gasoline*
- (2) professional athletes getting million dollar salaries*
- (3) large corporations polluting the environment*

The respondent then indicates HOW MANY, not which, of the items makes him or her angry.

Now the second of the three groups gets these same three items PLUS A FOURTH. One possible fourth item, for example, might be "black leaders asking for affirmative action."

The third of our three subsets of respondents also get the same three original items but a different fourth, such as: "a black family moving in next door."

Note that there is a baseline group, which received three items, a second group that were additionally asked about affirmative action, and a third group that were additionally asked about getting angry at the thought of a black family moving in next door. By comparing the mean level of items indicated within each group, the analyst can estimate the level of anger toward either affirmative action or a black family moving in next door.

Suppose, to take a hypothetical example, that the mean for the baseline group was 1.95 (on average, people in this group said 1.95 items made them angry), for the affirmative action group 2.50, and for the black family group 2.15. We would then estimate that 55 percent get angry over affirmative action $(2.50 - 1.95 \text{ times } 100\%)$ and that 20 percent get angry over a black family moving in next door $(2.15 - 1.95 \text{ times } 100\%)$.

One might ask whether using unobtrusive measures makes a difference in the responses people give. We have compared responses to the direct, traditional survey item with those to our unobtrusive measures. Generally, there is a considerable gap in the distributions of responses. In several surveys taken of University of Illinois students, for example, some five percent said directly that they opposed interracial dating. Using an unobtrusive measure, we estimated that nearly 30 percent opposed interracial dating. In our view, social desirability effects can

contaminate interview responses to questions about sensitive issues.

Let me, finally, turn to some of our substantive findings, most of which are based on measures of the sort I described above. I will not go into excruciating detail about each measure (only academics would want that!), but I stand ready to answer any questions you might have.

I have divided the discussion of substance into four parts: (1) the relationship between prejudice on the one hand and anger and opposition toward affirmative action on the other; (2) an identification of what other than prejudice seems to underlie the antipathy toward affirmative action; (3) the current relationship between political ideology and attitudes toward affirmative action; and (4) the role, if any, that affirmative action plays in exacerbating negative images of black Americans. I wish to underline what I said before: what follows applies to white adults only.

Prejudice and Attitudes Toward Affirmative Action

Perhaps the most obvious question of all is whether racial prejudice motivates the hostility among whites toward affirmative action programs for African-Americans. This is also the most difficult question to answer. Definitions of prejudice abound, and the concept has taken on a complexity that did not exist twenty years ago. Some see prejudice where others do not.

We have employed two quite different measures of racial prejudice: stereotypes and the unobtrusive measure described above. I will focus on the second, and say more about the former later in this document.

The unobtrusive measure described earlier assumes that anger toward the idea of a black family moving in next door is an expression of racial prejudice. Comparing responses of the respondents who received the three baseline items plus the "black family moving in next door" item with the responses of those who received only the baseline items, we estimate that about 12 percent of non-southerners are prejudiced. Among southerners, the equivalent estimate is about 42 percent.

Recall that a third group of respondents received the "black leaders pushing for affirmative action" item. When their responses are compared to those in the baseline condition, we find that nearly 45 percent of white non-southerners get angry over affirmative action and more than 90 percent of southerners do.

Let me convey what I have just presented in a slightly different way. In the non-South, about 12 percent express prejudice and nearly 45 percent express anger over affirmative action. In other words, prejudice explains somewhere between one-fourth and one-third of the anger over affirmative action. In the South, slightly more than 42 percent respond in a prejudiced way while over 90 percent express anger at affirmative action. At best, prejudice, as we have defined it, explains less than 50 percent of southerners' anger toward affirmative action. In short, in neither region can prejudice alone explain the anger toward affirmative action.

These figures lead to two conclusions. The first is that prejudice underlies some of the anger

toward affirmative action. To suggest otherwise would be to dismiss a pattern we have found in all of our surveys. (Moreover, we have also found that whites express more hostility toward affirmative action for African-Americans than for women. Again, it would seem the difference can only be attributed to prejudice.)

The second conclusion is that in neither region, South or non-South, can prejudice alone explain the anger toward affirmative action. For some people, hostility toward affirmative action arises from negative feelings toward black people; but for many others it does not.

All the research I have thus far discussed in this section asks people whether certain race items "make them angry." This is a relatively high threshold. Suppose people were asked whether they opposed a black family moving in next door or, alternatively, opposed affirmative action. What then happens to the percentages I just reported?

With respect, first, to affirmative action, more than 80 percent of white Americans express opposition. The opposition, in other words, is undeniably widespread. With respect to a black family moving in next door, using the word "oppose" rather than "get angry" increases the percentages noted above (42 percent in the South and 12 percent in the non-South) by about 10 percent.

All in all, then, racial prejudice remains a sad fact of American life. But it alone cannot explain the widespread outcry against affirmative action.

Sources of Antipathy Toward Affirmative Action

If it is not totally a matter of prejudice, what else undergirds the strong reaction to affirmative action among many whites? Based on our studies, I offer two plausible explanations for which we have found support.

The first is that many whites see affirmative action programs as unfair. In their view, such programs violate principles such as merit and hard work. Some people contend that couching opposition to affirmative action in terms of merit, hard work, and the like is just another means—in this case, a legitimate means—by which to express prejudice. I do not doubt that this indeed describes some of what occurs. However, an examination of all the relevant data we have collected during the past five years does not substantiate the thesis. Many white Americans genuinely feel that different standards are being applied to blacks and whites and that this is wrong.

I will report the results of two experiments here. In one, we asked people whether (BLANK) should be required to make it on their own rather than receive support from government. In one case, the (BLANK) was African-Americans, in the other immigrants from Western Europe. In both cases, whether the target group was African-Americans or immigrants from Western Europe, respondents overwhelmingly opted for people doing it on their own. Based on this experiment, at least, people apply the standard of self-help equally to all groups.

The second experiment was designed to determine whether the widespread support for hard work

and doing it on one's own in fact reflects a harshness among whites toward African-Americans. That is, does adherence to these principles mean that whites oppose any attempts to help black Americans?

One half of our national sample was asked:

"Some people say that because of past discrimination, qualified blacks should be given preference in university admissions. Others say that this is wrong because it discriminates against whites. How do you feel—are you in favor of or opposed to giving qualified blacks preference in admission to colleges and universities?

The other half received a differently worded version:

"Some people say that because of past discrimination, an extra effort should be made to make sure that qualified blacks are considered for university admission. Others say that this extra effort is wrong because it discriminates against whites. How do you feel—are you in favor of or opposed to making an extra effort to make sure qualified blacks are considered for admission to colleges and universities?

The differences in responses to the two versions are striking. Only one of four—25 percent—expressed support for the first version, couched in terms of preferential treatment. On the other hand, nearly 60 percent expressed support for some kind of (unspecified) extra effort.

It would appear, in other words, that a sizeable majority of whites see the need for and are willing to support some kind of extra effort as long as that effort does not sound like preferential treatment.

This second experiment also suggests a second reason why whites have expressed so much opposition to affirmative action—the very term has become a lightning rod that conveys considerably more preferential treatment than affirmative action, defined precisely, was intended to give. Sometimes political words take on a life of their own, which may be the case here. (Others, of course, see the term affirmative action as a symbol of commitment to racial equality.)

All in all, then, our data suggest that adherence to principles of fairness and the like explain much of the hostility toward affirmative action that prejudice does not explain.

Partisanship, Political Ideology and Affirmative Action

Our surveys indicate that anger toward affirmative action does not fall along traditional party and ideological lines among the mass public. Our two national surveys have found that resentment is spread almost evenly across people who hold different partisan affiliations and ideologies. Republicans express no more anger toward affirmative action, on the whole, than Democrats. Nor do people who call themselves conservatives—strong conservatives are the one exception—look much different than their liberal counterparts.

We have been talking about the distribution of anger—a good measure of intensity—toward

affirmative action. If we consider opposition rather than anger, there are some partisan and ideological differences, but they are small.

Our 1994 survey included both direct and unobtrusive measures of anger toward affirmative action. In the first instance, we simply asked people whether they were angry over affirmative action. In the second, we used the unobtrusive measure I described earlier. Our hypothesis was that the unobtrusive measure would uncover higher levels of anger. In fact, we found a 15 percent difference, with the unobtrusive measure identifying the higher level of anger.

What we also found was a significant difference in reporting among liberals and conservatives. Using the direct measure, about 33 percent of the liberals expressed anger and about 50 percent of the conservatives did. This is a 17 percent difference. Using the unobtrusive measure, however, 56 percent of the liberals expressed anger and 59 percent of the conservatives did. In short, using a direct measure, with all the social desirability trappings, we find a significant difference between liberals and conservatives. But when we turn to an unobtrusive measure, we find no difference at all.

The question, of course, is why are liberals more inclined to express anger when the measure is unobtrusive than when it is direct? Based on a thorough analysis of our data, we believe that liberals fear that publicly acknowledging their opposition to racial preferences tags them as a person less concerned about racial justice than they feel themselves to be. I want to be sure that this conclusion is clear. We are not suggesting that liberals are somehow devious in expressing their own attitudes toward affirmative action. We are suggesting that affirmative action has become a difficult issue for them.

(An aside: Contrary to media reports that the hostility toward affirmative action for African-Americans is largely concentrated among white males, we found little evidence for this contention in our two national surveys. Anger toward affirmative action, as we measured it, is quite equally disbursed across males and females. We did find a significant male-female difference among our southern respondents, with anger disproportionately concentrated among males.)

Affirmative Action and Stereotyping

One of the essential psychological processes of all human beings is categorization. We divide the world into men and women, students and non-students, liberals and conservatives, young and old. Indeed, it would be impossible to understand the world without categorizing.

What makes categorization especially important to the topic at hand is that categorization often leads to "we-they" thinking. Thus, for example, the more that white people think in black-white terms, the more likely they are to place African-Americans in the "they" category. (Of course, the same psychology applies to African-Americans—the more they think in racial terms, the more inclined they will be to place whites in the "they" category.) "We-they" thinking, in turn, causes people to increase negative stereotyping of members of the out-group, that is, the "they's."

To the extent that affirmative action increases categorical thinking along racial lines, it follows that it will also cause an increase in the use of negative stereotypes among whites. All the

available evidence indicates that negative stereotyping of blacks among whites is quite pervasive under normal circumstances; the question here is whether discussions of affirmative action might unwittingly exacerbate an already serious problem.

We have tried to answer this question as follows. In our surveys, one-half of our respondents were first asked to indicate how much they thought selected negative stereotypes ("dangerous," "irresponsible," "lazy," etc.) applied to African-Americans. A second half were also asked to answer the stereotype questions, but only after they first had read several questions about affirmative action. What we wanted to know is whether getting people first to think about affirmative action would increase the level of negative stereotyping.

We found that it does. Negative stereotyping was consistently higher among those who first thought about affirmative action than among those who did not.

What to make of this pattern is a matter of interpretation. I leave it to you to make it.

Concluding Comment

I have tried to present our data to you as straightforwardly as possible. I conclude with an admonition I made at the outset: transcend any particular finding and look at the evidence as a whole.

Good luck in your decisionmaking on a subject of great importance to all Americans.

Mr. CANADY. OK. Thank you very much, Professor.
Mr. Coleman.

**STATEMENT OF WILLIAM T. COLEMAN, JR., SENIOR PARTNER,
O'MELVENY & MYERS LAW FIRM**

Mr. COLEMAN. Mr. Chairman, before I start, I heard the testimony of the previous witness; I really shudder. Can you imagine that if I am a black person going for a job and I know that the manager is white, and my friends tell me that I've got 1 out of 5 chances that I'm going to be turned down because of hostility toward my color, it seems to me, if anything, that's another reason why you really need affirmative action. I could imagine, if I were in the armed services and felt that the white lieutenant was hostile toward me because of my color, and, therefore, he was going to send me out on the point, I certainly thank God that the Army had judgment enough to create an institution where race is much less relevant than any other institution in the United States today.

But I really want to thank you for this public opportunity to discuss the vital importance of various types of affirmative action as important business, social, economic, moral, and political tools to help continue the process of uniting and integrating America. Unfortunately, in my judgment, this hearing is labeled "the economic and social impact of race and gender programs." This is an unfair, misleading description, if the real issue is affirmative action, as the two, affirmative action and preferences, are light years apart. In my judgment, it is like calling the charitable tax deduction for gifts to educational institutions the Al Capone or Jesse James deduction for teaching and cause and prevention of bank robberies.

But, first, for the direct, simple answer to the question which I was informed would be posed to this panel today; to wit, is affirmative action causing racial pluralization? The answer is strong, simple, and direct: an unconditional "no." It would take the skill of one who could reproduce Beethoven's Ninth Symphony on the head of a pin to devise a system which would eliminate the effects of centuries of racial and gender discrimination without taking race and sex into account in the process.

Brown v. Board of Education made governmentally imposed racially segregation unconstitutional. It did not and could not, however, eliminate racial prejudice and misguided racial attitudes which still exist in this 20th century society.

I ask you for a moment to look at the facts. For over 400 years, everyone was taught to the contrary, whether teaching was by the Government, most churches, most schools, most businesses, most political parties—just about everybody. Secondly, since *Brown*, there have been some slight changes, but can any fair observer of the American scene today say that jobs, position of power, where most of us live, our education, our capital position, et cetera, has not been adversely affected by our status as African-Americans? Does any survey or picture of America today show that benefits and detriments are distributed among the people in such a way that one can say race is irrelevant?

If one believes in a just God, as I do, and I think everybody there, whether you're a Catholic or Jewish, Protestant, Muslim, or any other religion, you have to believe that God did not single out

one race to give them superior talent and make another race inferior. If you conclude that, which I think every good American does, then we all have to say that there's something in the system which prevents the normal forces from working. That is why affirmative action is required; it is merely the summary of all the measures used by the Federal, State, and local governments, universities and colleges, and corporations not only to remedy past and present discrimination, but also attempts to prevent future discrimination. This goal is a worthy effort and I think is accepted by the overwhelming majority of the American people

On pages 5 and 6 of my written statement, I have described various types of affirmative action, and that's one of the problems. When you use the word "affirmative action," in my judgment, you mean at least 100 different things, and I wish people would begin to describe exactly what they mean rather than put everything in one basket.

I want to say that, in my judgment, it is crystal clear, whether you read the Supreme Court decisions, statements of the President of the United States, or any other person, that affirmative action is not about quotas; it is not about affirming a situation which benefits or distributes based solely upon race and regards color qualification; it is not about abandoning merit. In fact, if you read, re-read, the *Griggs* case, it's just the opposite. There you had a system where blacks were excluded without having an opportunity to share their merits, and the Supreme Court said that was wrong.

Thirdly, on this issue of race discrimination, as I have looked at the latest statistics of the Labor Department, only 1 to 3 percent of all of its cases involve any claim by a white male that he has been discriminated against, and in most of those cases it's a case where the white male is claiming that the white woman took his job, not that a black took his job.

In fact, in this society white males have done, still do, and will continue to do as long as I live, quite well. Ninety-six percent of all American CEO's are white, 85 percent of tenured college faculties, 86 percent of law firm partners, approximately 80 percent of the U.S. House of Representatives, and 96 percent of the U.S. Senate. White male earnings are 33 percent higher than for any other group.

I'd ask any of you the next time you go back to your district to walk through almost any factory and try to determine who has the good jobs and those that determine, and I'm pretty sure that none of you will find that blacks begin to anywhere represent what they represent in the population. I could go on, but I think if you look at it in every instance, and I tried to lay it out in the paper, every instance you look at, the fact is that black Americans do less well in terms of job opportunity than white Americans.

Also, I think that you have to reexamine this resurgent myth of white superiority, "The Bell Curve," the end of racism. Can you imagine that our universities are still training professors who write a piece to say that slavery was not wrong and segregation was really the altruistic white person realizing when he freed the black that he had to give him less work because he or she didn't have the ability.

Affirmative action has had benefits. For example, in 1970, only 23,000 of all the police officers were black. Today—in 1990, the figure was 63,000. No one who watched the situation in Los Angeles, or any other city, including my beloved Philadelphia, won't say that there is a great public interest in seeing to it that there are many more minorities on the police force in these urban communities.

The situation with respect to blacks who finish high school and go on to college has improved. It's increased 27 percent since 1982 to 1992. Between 1976 and 1980, black colleges enrollment has increased 5 percent. Yet, still there's a great lag. In 1991, only 11.5 percent of blacks had completed 4 or more years of college, as compared to 25.9 percent of whites. And being a Republican, I'm embarrassed to say this: "When the Reagan administration began to decrease the sweep of affirmative action in education, the figures showed dramatically that the number of blacks getting opportunities dropped." Also, with respect to the Banneker scholarship at the University of Maryland, once the program was ended, the number of blacks went from 36 down to 19.

I see my red light is on already. In summary, I'd just like to say—and I wish you'd read the appendices that I tried to accumulate—most business executives favor affirmative action. Most political leaders do. Nine Presidents have favored it. Most educational institutions do. The American Bar Association—and I could go on and on.

I've then tried to lay out in my paper the reason why I think that there is this increased feeling of racial hostility, one being that it may not be any different; it's just the fact that it's hit the front page again. Second is, if you would just look at the difference with respect to how police treat their citizens, you can understand it. Third, you will find that discrimination still exists in this country, and I think, and I close my statement with quoting from Charles Lamb, who said: "I could never hate anyone I know." Once you end segregated segregation, which you haven't; once you end segregated universities, which you really haven't if you mean by that blacks participating appropriately; once you end segregation in the work force and people really begin to live and work together, I think that at that point you will see a reduction in racial hostility.

I beg you not to take away the one tool which has worked in this country to help. I also beg you—and then I will be finished—take one day at 8:15 in the morning, leave the Waldorf Astoria right up Park Avenue, watch those well-scrubbed white kids come out, go to those great private schools, go to those good few public schools in New York located near them; swing up past 123d Street through Harlem. Look at the different conditions, and then ask yourself, if that's what this country's doing to its people, is Columbia University unfair, is NYU unfair, that when it looks at who it's going to admit to college, that it doesn't say I have to use something other than merely scores to determine which of those citizens 20 years from now will really lead this country.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF WILLIAM T. COLEMAN, JR., SENIOR PARTNER,
O'MELVENY & MYERS LAW FIRM

"AFFIRMATIVE ACTION" AS USED TODAY
DOES NOT, COULD NOT, AND SHOULD NOT CAUSE
RACIAL POLARIZATION

Mr. Chairman and the members of the Subcommittee. Thank you for this opportunity to address the importance of affirmative action as a business, social, economic, moral and political tool that has helped unite and integrate Americans. The topic of this hearing is "The Economic and Social Impact of Race and Gender Preference Programs." As I will discuss, I object to the word "preferences" if the topic is affirmative action. They are not the same. For the direct, simple question I was informed would be posed to this panel here today, "Is affirmative action *causing* racial polarization," my answer is strong, simple, direct: an unconditional "no."

Mr. Coleman is Senior Partner in the law firm of O'Melveny & Myers, was Secretary of Transportation in the Ford Administration and is Chairman, NAACP Legal and Educational Defense Fund, Inc. Attached hereto as Appendix A is a more extended biographical sketch. It is attached not as an ego indulgence but (1) to demonstrate that the American dream is still much alive and (2) to demonstrate that I have had over 50 years as an adult, contacts with many forces in the United States in many diverse situations and thus might have some sound judgment on how people react and feel.

It would take the skill of one who could reproduce Beethoven's Ninth Symphony on the head of a pin to devise a system which would eliminate the effects of centuries of racial and gender discrimination without taking race and sex into account in the process. As one of the lawyers for the plaintiffs in *Brown v. Board of Education*¹, in *Aaron v. Cooper*² (the Little Rock School case), and other cases, I can unequivocally say that affirmative action, as used and approved by courts, businesses, educational institutions, the federal executive branch and most states, is not what is increasingly dividing America today on the basis of race.

Brown, known as the case that struck down the doctrine of separate but equal, is clearly a turning point for the good in American history. Unfortunately, the one thing, however, that courts could not guarantee through *Brown*, is that racial prejudice and racial and gender discrimination, simply because of Supreme Court decisions, would be eliminated root and branch from American society. Although the nation has made many gains toward making America, for all of its citizens, the home our forefathers at Philadelphia in 1787 and their sons and daughters at Gettysburg and Lookout Mountain in 1863-4 ordained, we continue to face division among the races. The reason for this division today is no different from the reason for the division between the races at the time *Brown* was decided. In fact, increased access to knowledge and

¹ 347 U.S. 483 (1954).

² 358 U.S. 27 (1958).

prosperity for only parts of our society have exacerbated it. Affirmative action is not what divides us. In fact, to the contrary, it is an instrument that has been vital to bridging the divide and making one nation indivisible for all Americans, our nation of people that Theodore Roosevelt and Woodrow Wilson and every American President since has recognized as "exceptional."

WHAT IS AFFIRMATIVE ACTION?

Affirmative action is a tool used to bring about equal opportunity in employment, business contracts, education and housing. It is a summary of those measures by which federal, state and local governments, universities and colleges, and corporations not only remedy past and present discrimination, but also prevent future discrimination in a worthy effort, accepted and yearned for by most Americans, to attain an inclusive society. Affirmative action permits the use of race or gender-conscious measures to bring about equality of opportunity. As Justice Blackmun so eloquently stated, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetrate racial supremacy."³ I can attest to the fact, that had the Court in *Brown*, and courts in many other civil rights cases, not taken race into account in fashioning a remedy, the two distinct worlds

³ Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring opinion).

which existed prior to *Brown* would today be even more separated⁴ and the American cry of freedom and equality would be revealed to the entire civilized world as a mere illusion.

Affirmative action is a flexible concept which includes various actions to ferret out those present barriers for women and most minorities, not based upon merit and qualifications, to opportunity. As long as such barriers exist, women and most minorities are deprived of opportunities which white males, many of less qualifications if measured by merit, often in the past and still receive. For example, where an employer formerly may have only used word-of-mouth announcements for new job openings, thus perpetuating an all-white-male work force, the employer's affirmative action plan may include job postings and announcements in media targeted at minorities and women. Also, an educational institution may use scholarships which are designed to attract students who belong to groups that were historically denied admission. Or an educational institution, realizing the inferiority of instruction and teaching in certain urban public schools, might use tests which would try to bring out the real intelligence and intellect of students who got their first 12 years

⁴ In *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), the Supreme Court struck down a state statute which prohibited student assignment on the basis of race. Chief Burger explained that "[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*." 402 U.S. at 46.

of education in such inferior schools. Other programs may include training and apprenticeship efforts.

Affirmative action also has been a significant and needed tool for effective enforcement of anti-discrimination laws. Not only is affirmative action used as a remedy in cases of actual, proven racial or gender discrimination, it has also been voluntarily adopted to prevent or avoid possible future racial or gender discrimination. In enacting Title VII of the Civil Rights Act of 1964, Congress intended to encourage employers to come into voluntary compliance with the law and the nation's goal. The Supreme Court has held that prohibiting such voluntary efforts would "imped[e] attainment of the ultimate statutory goals."⁵ In his concurrence, Justice Blackmun explained that forbidding voluntary efforts would "plac[e] voluntary compliance with Title VII in profound jeopardy."⁶ Voluntary measures play an integral role in "breaking down old patterns of racial segregation and hierarchy."⁷ Significant gains have also been made in education, housing, and contracting because affirmative action has opened doors that were once closed to minorities and women.

Consider this hypothetical: A city in the North, South, East or West of 750,000 people, 30% of which are minority, 50% are female. Yet, the police force includes no minority members and no

⁵ United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 207 (1979).

⁶ *Id.* at 210 (Blackmun, J., concurring).

⁷ *Id.* at 208.

women. There are also one or two schools in the white sections of town with meaningful courses that would help one to pass civil servant examinations, including the policemen's entrance exam. Also, much of the previous hiring and notices of vacancies were done in such a manner that families of present and past policemen got hired and notices of vacancies appeared only in the white newspapers of general circulation. On January 1, 1985, because of a court decree, or political decision, or just plain intelligence, the city was forced, or voluntarily decided, to end its practice of racial and gender discrimination in the police force. Statistics show that through death or retirement, there is a turnover of about 300 policemen per year. Certainly, if the police department, using its former methods and its former tests, got an initial eligibility list which was only 2% minority and 1% female, it would be irresponsible if it did not take various types of affirmative action to increase the number of minorities and women on the police force eligibility and hiring list, as each year it replaced its 300 white retirees.

Suppose, in addition, to take the examination for sergeant or higher there was a requirement that the applicant had to be on the police force for at least 10 years, or an applicant got an extra point for each year he or she served on the force as a police officer. I think most people and most scientific literature would agree, it is important to have minorities and females as sergeants or higher. Thus, a form of so-called "affirmative action" would have to be used to serve best the public interest.

Where race and gender were used for years as an exclusionary device, these characteristics (race and gender) obviously must be taken into account in order to provide opportunities to qualified workers who were adversely impacted by prior and current discrimination. Furthermore, such efforts would need to be continued in order to bring representation of minorities and women to approximately the place it would have been in the absence of prior discrimination.

MYTHS AND DIVISIVENESS

As I will show in more detail in a few minutes, a strong majority of Americans, including a majority of white Americans, actually support affirmative action. To the extent that some white Americans, even though clearly in the minority, oppose affirmative action, it is caused to a large degree by misunderstanding about the nature of this remedial tool and also by a lack of knowledge of history and its current implications. The media and some politicians bear a great deal of the blame for perpetuating myths about affirmative action. Thus, I call upon this esteemed body to take action to educate all segments of the public about the true nature of affirmative action. Perpetuating myths about affirmative action, and in the case of some political figures, using this issue for temporary political gain, is a disastrous national strategy. Ultimately, using myths and thereby miseducating Americans will only impede the progress we have made over the past thirty years, toward a more inclusive and productive society.

The first myth is that affirmative action is about quotas, *i.e.*, a hell-bent desire to get a certain percentage of minorities or women hired regardless of their qualifications. Nothing could be further from the truth. Affirmative action is not, and never has been, a device to achieve a quota system requiring rigid results, without regard to qualifications. Neither the federal government, nor the Supreme Court, nor the NAACP Legal Defense and Educational Fund, Inc. (LDF), nor the Lawyers' Committee for Civil Rights under Law, nor American businesses, unions or educational institutions, have ever endorsed quotas or a need for quotas. For example, as early as 1973, the Nixon Administration, one of the two parents of affirmative action, issued an Interagency Agreement which flatly rejected quotas. Instead, to enforce President Johnson's Executive Order No. 11246, which imposes affirmative action requirements on federal contractors, President Nixon endorsed the use of *flexible employment goals and timetables* set in relation to the pool of qualified minorities.⁸ This policy was later adopted in regulations which expressly reject quotas, stating: "*Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.*"⁹

⁸ Memorandum - Permissible Goals and Timetables in State and Local Government Employment Practices (March 23, 1973).

⁹ 41 C.F.R. § 60-2.12(e) (emphasis added).

In 1986, the Supreme Court upheld the use of *goals* (not quotas) in *Local 28, Sheet Metal Workers v. EEOC*¹⁰, as a remedy for race discrimination. Goals and timetables, not quotas, continue to be used not only as a court-ordered remedy for discrimination, but also are voluntarily used by governments and the private sector affirmatively to provide opportunities for all Americans. "[T]his understanding of the difference between goals and quotas seems to me workable and . . . consistent with [Title VII]."¹¹

The second myth (or oft repeated untrue tale) is that merit qualifications are abandoned in the implementation of affirmative action programs. Merit qualifications are exactly what affirmative action requires. Affirmative action discards impermissible and irrelevant qualifications; it creates "an environment where merit can prevail."¹² For years, educational institutions and employers often accepted individuals using criteria not related to merit, but which favored white male applicants. Since *Griggs v. Duke Power*¹³, however, such traditional measures of "merit," having nothing whatsoever to do with the actual qualifications to do the job, have been successfully challenged. Word-of-mouth hiring, nepotism, and job requirements unrelated to job duties have finally been exposed as measures used to advantage white males, without regard to merit.

¹⁰ 478 U.S. 421 (1986).

¹¹ *Id.* at 496 (O'Connor, J., concurring).

¹² *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974).

¹³ 401 U.S. 424 (1971).

Where affirmative action programs are utilized, no longer can white males be given opportunities to the exclusion of women and blacks and other minorities solely because of their group affiliation. Now, opportunities are also open to qualified minorities and women.

Furthermore, the myth and oft told false tale that affirmative action forsakes qualifications is degrading to minorities and women. This theory presumes that in any instance in which an affirmative action plan operates, minorities and women who make gains are not qualified to do so. In 1941, I became one of four black freshman at Harvard Law School. I went on to become the first black Supreme Court clerk, perhaps the first black partner in a major law firm, Secretary of Transportation under President Ford, and Senior Partner at O'Melveny & Myers. I assure you that, but for certain affirmative actions along the way, some of these steeples of opportunities would have passed me by, as they have passed by, or been denied to so many equally competent people in my race.

Another myth is that so-called "reverse discrimination" results from affirmative action. So-called "reverse discrimination" has become the constant refrain of many who oppose affirmative action. The media has given great attention to what they have termed "angry white males," who are allegedly the victims of affirmative action.

In fact, even claims or allegations of actual reverse discrimination in cases filed or cases before government agencies are exceedingly rare. The Labor Department reported that reverse

discrimination cases constituted only between one and three percent of more than 3000 reported federal cases between 1990 and 1994.¹⁴ Many of these reverse discrimination claims were brought by disappointed white males who wrongfully assumed that women or minorities obtained job opportunities because of race or gender, not qualifications. But let us look at the evidence.

Across the board, white males are doing very well. White men make up 96% of America's CEO's.¹⁵ In addition, white males are over 85% of tenured college faculty, over 86% of partners in major law firms¹⁶, and lest we forget, almost 80% of the U.S. House of Representatives and 89% of the U.S. Senate. And, the Senate is 96% white. The continued domination of white males in these occupations leaves little room for minorities and women. Furthermore, in 1992, white males' median weekly earnings were 33% higher than those of any other group in America.¹⁷ Preferential treatment for white males has clearly worked in America. We must continue to attempt to bring others to the table of opportunity, for the good of the whole nation.

¹⁴ *BNA Daily Labor Report*, March 23, 1995, AA-1.

¹⁵ Faye Rice, "How to Make Diversity Pay," *Fortune*, Aug. 1991, at 82.

¹⁶ Statistical Abstract of the United States 407-410 (1994).

¹⁷ U.S. Department of Commerce, Statistical Abstract of the United States 426 (1993).

THE RESURGENT MYTH OF WHITE SUPERIORITY

Finally, I must address one last myth, which is perhaps the unspoken premise underlying the other myths about affirmative action. And this is the myth, which appears once again to be gaining currency, that blacks are simply inferior and undeserving of a more equitable share of the American pie. Ultimately, the case for affirmative action rests on the belief that, in the absence of a history of, and current manifestations of, discrimination and prejudice, America's educational opportunities, jobs, wealth and other societal benefits and responsibilities would be distributed much more evenly among racial groups and between men and women. Those of us who believe in a God, whether Christian, Jewish, Muslim, or of another religious group, find it impossible to conclude that God would be unfair in the distribution of talents among groups of persons. In my belief, God is fair and it is simply inconceivable that ability, intelligence or character has been disproportionately reserved for one superior group.

The drive from downtown Manhattan, up Park Avenue, through Harlem and over the river to LaGuardia Airport, a trip I have taken many times by car, is a frequent reminder to me of the unfairness of the current distribution of material advantages and educational opportunities. Along Park Avenue, I see children, almost all of them white, impeccably dressed in expensive clothing, emerge from their luxury apartments, on their way to elite private schools with the highest quality in educational resources. Just a few minutes later, another group of children, almost all black or Hispanic,

step out of dilapidated housing, and walk over debris to rundown school buildings starved for resources, such as textbooks and computers. Only a non-rational person or a bigot can deny that if the white children from Park Avenue immediately after birth traded places with the minority children from Harlem, the educational achievement of each group would reflect the quality of their schools and their teachers, not their race. I would ask opponents of affirmative action if they really believe that there are not many children in inadequate schools in poor neighborhoods around the country that are as inherently bright and intelligent as those kids on Park Avenue. When Columbia University or any other college or university makes its admissions decision, I strongly advocate that it is appropriate affirmatively to include qualified minority students who have suffered from educational deprivation.

At its core, a large part of the case against affirmative action boils down to the claim that whites are superior, and that blacks are inferior. Otherwise, the myths that African Americans are getting positions and benefits for which they are not qualified or entitled could not be seriously asserted. Recent publications are recirculating the once discredited claim that blacks are inferior as reason to abandon affirmative action. For example, *The Bell Curve*¹⁸ argues for an end to affirmative action because "it has

¹⁸ Richard J. Herrnstein & Charles J. Murray, *The Bell Curve, Intelligence and Class Structure in American Life* (1994).

been based on the specific assumption that ethnic groups do not differ in abilities" and "that assumption is wrong."¹⁹

I am distressed that it seems to have become socially accepted in public discourse to express the racial superiority assertion which we thought had been banished with the decision in *Brown v. Board of Education*. As an honors graduate of University of Pennsylvania and of the Harvard Law School, a member of the *Harvard Law Review*, and, recently, the recipient of the Presidential Metal of Freedom, I am enraged, insulted and deeply saddened by recent, highly trumpeted, purportedly scholarly works, claiming that blacks are not as intelligent, nor as culturally advanced, as whites. The assertions in *The Bell Curve* rely upon racial eugenics, recycling the very theories that supported oppressive regimes of slavery, Nazi Germany and segregation. And, in the same vein as *The Bell Curve*, the deceptively titled, *The End of Racism*²⁰, asserts that American slavery was not a racist institution, and segregation was only an attempt by paternalistic whites to permit blacks "to perform to the capacity of their arrested development."²¹

The resurging public acceptability of racial inferiority attacks also explains the justifiable alienation and anger felt by African Americans. Is it any surprise that even middle- and upper-

¹⁹ *Id.* at 449.

²⁰ Dinesh D'Souza, *The End of Racism* (1995).

²¹ *Id.* at 179.

income African Americans are enraged and feel excluded from the mainstream of America when publications such as these receive widespread attention? As recently reported in the *Washington Post*, even "for the most high-achieving African Americans . . . the moment never arises when race can be treated as a total irrelevancy. Instead, too often it is the only relevant factor defining our existence."²² The invidious, corrosive impact of the recent, highly publicized resurgence of these racial eugenics theories is indescribably damaging to the tenuous hold African Americans have achieved on the American dream. I suggest the country would be better served if Congress would hold hearings to expose these deceptive racial inferiority claims, instead of once again debating the highly beneficial policy of affirmative action. I call upon this Subcommittee, and the entire Congress, forcefully to reject these claims of racial inferiority and, as proof of the Congress' belief in the character and intelligence of African Americans, other minority groups and women, to reaffirm the federal commitment to affirmative action as a gradual method of moving toward a more equitable division of society's resources, benefits and responsibilities.

²² Kevin Merida, "Worry, Frustration Build for Many in Black Middle Class; Growing Worries Among Black Middle Class Series; Reality Check: The Paradox of Program Series", *Washington Post*, Oct. 9, 1995, at A22 (quoting Ellis Cose, The Rage of a Privileged Class (1993)).

AFFIRMATIVE ACTION WORKS

Affirmative action continues to tear down America's "Whites Only" signs, which still exist, if only subtly. Through affirmative action we have made some strides toward equal opportunity, but we still have far to go.

In education, African Americans have made significant gains since *Brown* because of affirmative efforts to provide educational opportunities. These gains will impact generations to come.²³ The number of black high school graduates enrolling in college increased 27% between 1982 and 1992.²⁴ Between 1976 and 1980, black college enrollment increased five percent.²⁵ Yet, blacks still lag behind. In 1991, only 11.5% of blacks had completed four or more years of college, as compared to 25.2% of whites.²⁶ There is no evidence that any of these gains have resulted in fewer white males getting educational opportunities.

²³ Over the past 20 years, the scores of minority youth in math and verbal/reading achievement tests have risen significantly. The gap between test scores of whites and minorities has decreased by approximately 40% between 1975 and 1990. Higher test scores may in part be attributed to higher educational attainment among parents. Rand, Student Achievement and the Changing American Family 16, 45-46 (1994). Of course, affirmative action has been a strikingly effective tool in producing more educational opportunities in higher education for African Americans.

²⁴ "Blacks' College Enrollment Slows," *The Baltimore Sun*, Jan. 8, 1995 (citing to a December 1994 study by the American Council on Education).

²⁵ National Association for Equal Opportunity in Higher Education, The Status of Blacks in Higher Education (1989).

²⁶ National Urban League, Inc. The State of Black America 1993 249 (1993).

Without continued affirmative action, however, the gains of minority students are likely to slow or even be reversed. As soon as the Reagan Administration began efforts to cut back on affirmative action, African American college enrollment slipped 3.8%, from 1980-1984.²⁷ In 1993, African Americans received only 2.8% of the 39,754 doctorates awarded in the U.S.²⁸ These numbers need to be increased. Recently, the U.S. Court of Appeals for the Fourth Circuit, reversing the District Court of Maryland, held unconstitutional the University of Maryland at College Park's Benjamin Banneker minority scholarship program. The Banneker program was designed to attract high-achieving African American students to the University, to aid the state's effort to desegregate the state's flagship university. In the year since the decision, the University combined the Banneker program with an existing program, where race is one factor among others in the selection process; as a result, the number of high-achieving African American students who received scholarships has dropped from 36 to 19.²⁹

²⁷ National Association for Equal Opportunity in Higher Education, The Status of Blacks in Higher Education (1989).

²⁸ *Id.*

²⁹ In *Hopwood v. Texas*, 861 F. Supp 551 (W.D. Tex. 1994), the court found that out of approximately 500 seats available for entering law students at the University of Texas School of Law in 1992, the class would have had at most nine African Americans and 18 Mexican Americans had the school been required to admit students solely on the basis of their Texas Index scores (composite number based on applicant's grade point average and LSAT score), without regard to race and other considerations. *Id.* at 563, 571. It is (continued...)

In employment, African Americans have clearly made gains, many of which would not have occurred except for affirmative action programs in education and employment. For example, in the ten years following the passage of the Civil Rights Act of 1964, little progress was made in desegregating large city police and fire departments. However, after affirmative action programs were put in place either voluntarily or by court order -- many the result of lawsuits brought by the Legal Defense Fund -- minorities and women began to make inroads in significant numbers. In 1970, 23,796 of the nation's police officers were black, while in 1990, 63,855 police officers were black.³⁰

When I served as Secretary of Transportation for President Ford, I was dismayed at the low numbers of minority employees in the Department and the low level of participation of minorities in construction projects funded by the Department. When I took the oath of office to uphold the Constitution and the laws of the United States, I had a duty to ensure that all Americans were provided with equal opportunities to employment and that contractors of all races could share the profits of federal contracts. To make this a reality, I made affirmative action an

²⁹(...continued)

important to note that the Texas Index has not been shown to be a valid predictor of success for African American students at the Law School, Declaration of Mr. Martin Shapiro, June 1994, filed in *Hopwood*, and that, but for the use of affirmative action in admissions, African Americans would have been unlawfully excluded from the institution.

³⁰ Andrew Hacker, Two Nations: Black & White, Separate, Hostile, Unequal 121 (1992).

essential prerequisite for government funding and created goals and other incentives for the hiring of minority personnel. We made substantial progress. Minority certified public accountants were hired to examine the Federal Aviation Administration's books; more minorities were recruited as air traffic controllers; the Northeast Corridor Project included a substantial minority business program, which has not only benefited black entrepreneurs but created construction jobs and training for black laborers. Also, in connection with the grant of money for the subway system in Atlanta, Georgia, I insisted that the competition had to be devised so a significant number of the stations should be designed by minority architects. The Olympic visitors will witness some of the best designed subway stations in the world. Affirmative action worked at the Department of Transportation.

Affirmative action has significantly increased educational and employment opportunities for women. Women represented only 7.4% of undergraduate business degree recipients in 1959-60. Thirty years later women were awarded almost half (46.7%) of undergraduate business degrees. Women also made significant progress in biological science, engineering, mathematics and physical science.³¹ In 1975, women were 4.3% of architects, 13.1% of economists, and 7.1% of lawyers.³² In 1993, women were 18.6% of

³¹ *The American Woman, 1994-1995, Where We Stand*, Table 2-4.

³² *Id.* at Table 3-10.

architects, 47.6% of economists and 22.8% of lawyers and judges.³³

Clearly, progress has been made, but affirmative action is still needed. The playing field has not been leveled for minorities and women. For example, African Americans, who constitute 11% of the total workforce, make up less than 3% of lawyers and dentists and less than 4% of doctors, industrial engineers, engineers, and managers in marketing, advertising and public relations.³⁴ In addition, average earnings of African American workers in 1990 was only 73% of white workers earnings.³⁵

African Americans also suffer greatly from a 400-year disadvantage in the accumulation of wealth. Whites have been the beneficiaries of centuries of unfettered access to assets and capital essential to the creation of wealth. I would beg this committee to read all of the federal and state statutes and the history of Administration's thereof up until *Brown*, in which the Government made grants to its all citizens except for African Americans. Until the past 40 years, moreover, most areas of entrepreneurship and capital accumulation were closed to African Americans. Even today, African Americans still face discrimination by financial institutions that hold the balance of power in the formation of capital. White Americans also hold the advantage over

³³ Bureau of Labor Statistics, "Employment and Earnings" Table 22 (Jan. 1994).

³⁴ Statistical Abstract of the United States 393, 407-410 (1994).

³⁵ Andrew Hacker, Two Nations: Black and White, Separate, Hostile, and Unequal 101 (1992).

similarly situated African Americans in the accumulation of wealth through inheritance, a transmission of inequality from generation to generation. For if mother and father and grandmother and grandfather were denied the opportunity to accumulate wealth they can't pass it on to their children.

By illustration, in a recent book, *Black Wealth/White Wealth*, the authors found that blacks and whites with similar educational and occupational characteristics have a \$43,143 difference in financial assets. In addition, the average black household and the average white household have a \$25,000 "racial gap" in financial assets alone.³⁶ The authors attribute this contemporary racial gap in resources to the historic origins of inequality in the accumulation of wealth and other material assets.

I can also use my own example to illustrate the point. When I came out of the Army in 1945, black veterans could not purchase the \$8,000 homes on Long Island that were available to white veterans.³⁷ Today, those homes are worth over \$200,000 and the

³⁶ Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective On Racial Inequality* 8 (1995).

³⁷ This is also a good example of how public policy has influenced discrimination in the accumulation of wealth. Low-interest, long-term loans backed by the federal government have historically provided a significant opportunity for the accumulation of wealth for the average, middle-class, white family. Government policies like those of the Federal Housing Administration in post-World War II America, which included model "restrictive covenants" and the denial of home loans in areas of significant "colored residents," created opportunities for whites to accumulate wealth through homeownership and denied similar opportunities to blacks. *See id.* at 39.

children of those white veterans have the inherited wealth that was denied to black veterans then and to their children today.

Women, like minorities, continue to trail white men in most arenas. The Glass Ceiling Commission, a bi-partisan committee appointed by President Bush, recently concluded: "White women are advancing but the progress is slow. Minority women are even more severely underrepresented in senior management than their white female peers."³⁸ Women are relegated to lower paying jobs regardless of education. In 1991, women were only 6.6% of the executive level managers of the companies surveyed.³⁹ In 1989, minorities and women only comprised 3%-5% of top managerial positions.⁴⁰ Detailed information about the Glass Ceiling Commission Report is set out in Appendix B.

For minorities and women, higher education has yet not resulted in achieving the same pay level as that of white males. College educated white women earn \$12,000 less than college educated white men; black women make \$13,000 less. In fact, women with college degrees make little more than white males with only a high school diploma. White women make \$2000 more per year and

³⁸ Federal Glass Ceiling Commission, Good For Business: Making Full Use of the Nation's Human Capital 155 (1995) [hereinafter Glass Ceiling Report]. See Appendix F for a summary of the findings of the Glass Ceiling Commission.

³⁹ *Id.* at 155.

⁴⁰ *Id.* at 151 (citing Korn/Ferry International & UCLA Anderson Graduate School of Management, Decade of the Executive Woman, (1993)).

black women make \$1000 more.⁴¹ If progress is to continue, affirmative action must be continued.

AMERICANS SUPPORT AFFIRMATIVE ACTION

You would not believe it if you relied mainly on much of the media and many politicians today running for higher office, but the majority of Americans support affirmative action. For, despite efforts of some affirmative action opponents to circulate myths, affirmative action enjoys broad support among members of the public and leaders of our country's institutions. This broad-based support for affirmative action, even in the face of an unprecedented barrage of attacks and negative media coverage over the last year, is striking proof that it is not affirmative action which causes racial polarization today in this country.

The business community has embraced affirmative action and has made commitments to providing increased employment opportunities to minorities and women. Programs that stress diversity and the removal of barriers that have historically excluded minorities and women have become a mainstream part of productive business management. In a March 1989 survey by *Fortune*, 68% of CEO's said that affirmative action programs were "good, very good or outstanding," while only 2% called them "poor."⁴² In 1995, 73% of

⁴¹ National Committee on Pay Equity Analysis, Bureau of the Census 1992 data.

⁴² Alan Farnham, "Holding Firm on Affirmative Action," *Fortune*, Mar. 13, 1989, at 87.

CEO's participating in a poll of companies with more than 10,000 employees said that they would continue affirmative action even if the federal government no longer required them to do so.⁴³ Corporate leaders understand that affirmative action makes good business sense.

AT&T Chairman, Robert E. Allen, calls affirmative action "not just the right thing to do, it is a business necessity."⁴⁴ Proctor & Gamble Chairman and CEO, Edwin L. Artzt, has described affirmative action as "a positive force in our Company." He explained: "Regardless of what Government may do, we believe we have a moral contract with all of the women and minorities in our company . . . and no change in law or regulation would cause us to turn back the clock."⁴⁵

Political leaders, Republicans and Democrats alike, have also realized that affirmative action benefits America. Nine successive presidents, starting with President Eisenhower, have supported affirmative action. For example, early in my career, President Eisenhower appointed me a member of president Eisenhower's Committee on Governmental Employment Policy (1959-1961) (also known as the "Branch Rickey Commission,") whose task was to increase the

⁴³ Morton Kondracke, "Affirmative Action Crossroads," *Washington Times*, May 30, 1995, at A13.

⁴⁴ Gleckman, et al., "Race in the Workplace, Is Affirmative Action Working?" *Business Week*, July 8, 1991, at 53.

⁴⁵ Edwin L. Artzt, Private Sector Leadership Award Address, Leadership Conference on Civil Rights, May 3, 1995. Additional examples of business support are set out in Appendix B.

numbers of minorities and women employees in the civilian federal government work force and to make sure more were promoted to policy-making positions. More recently, in rejecting a proposal by one of his advisors to eliminate federal affirmative action programs, President Bush stated when he signed the Civil Rights Act of 1991: "I say again today that I support affirmative action. Nothing in this bill overturns the government's affirmative action programs."⁴⁶

Governor George V. Voinovich of Ohio (one of my fellow Republicans) has stated: "Affirmative action programs have made a real difference in terms of people's chances of participating in our society and sharing in its benefits."⁴⁷ When asked about Governor Pete Wilson's campaign⁴⁸ to end affirmative action,

⁴⁶ Ann Devroy, "President Signs Civil Rights Bill; White House Disavows Proposed Directive to End Affirmative Action," *Washington Post*, Nov. 21, 1991, at A1.

⁴⁷ "Affirmative Action Backed," *The Columbus Dispatch*, July 27, 1995, at A1.

⁴⁸ One of the great tragedies of the 1996 Presidential Campaign so far is the fact that Governor Wilson, for political gain, thought he had to reverse his life-long public commitment as a supporter of affirmative action, which he had held and publicly stated over many years as Mayor, Senator and Governor. I think history will write ill of him that he sought and attained this change in the California University system, despite the fact that the Chancellors of the University system supported the goals and aims of affirmative action, thought it was working quite well and the removal thereof would have an adverse effect on such system. See Appendix E for quotations from University of California Chancellors.

Governor Voinovich stated, "I don't think it's right to throw out the baby with the bath water."⁴⁹

Recently, Republican Governor Weld of Massachusetts also expressed his support for affirmative action. In a commencement speech at Northeastern University, Governor Weld stated:

I believe our society needs a little *nudge* to make sure we're all sitting at the table in 2010, enjoying the fruits of our economic pie. Indeed, I suggest that if all groups are sitting at the table, that will make the pie bigger! . . . There is no reason why government shouldn't give this nudge.

For businesses, a diverse workplace is not just a moral issue; it is a business necessity. Companies like Lotus and Gillette and Polaroid know that part of tapping into new, unfamiliar markets involves bringing new and sometimes unfamiliar faces into the board room. . . .

If you were designing our society, you wouldn't design an all-white police force for a city that's half black. The same goes for the composition of our public universities. And the same goes for the roster of our successful business firms.

* * * *

The "nudge" I have been talking about goes by the name of "affirmative action." People say it's not perfect, it can sometimes work unfairness. Right. But the same goes for our tax system, and our defense procurement system. Same goes for democracy. We don't discard those systems when we see an individual application we don't like. Why? Because we understand the systems are there

⁴⁹ "Affirmative Action Backed", *The Columbus Dispatch*, July 27, 1995, at A1.

for a necessary *purpose*. Same goes for affirmative action.⁵⁰

Governor Weld also pointedly addressed the subject of whether affirmative action causes divisiveness:

People say affirmative action breeds so much resentment among the 90% of society not being nudged forward, that it causes racism. Wrong. Affirmative action started in 1964. Did racism spring up in 1964? . . .

I suggest to you that increasing the size of America's economic pie -- which can be achieved only if everybody has a seat at the table -- is the most important challenge facing our country today.⁵¹

The above and other instances demonstrate that most Republicans have been firm supporters of affirmative action.⁵²

Affirmative action programs are strongly supported by college and university presidents as essential to the educational mission. California State University President John Welty has explained: "Affirmative action was implemented to remedy past discrimination. Opponents will argue that it creates unfair advantages, but it does not. It helps us remedy the institutional racism that is part of

⁵⁰ Governor William Weld, Northeastern University Commencement Address (June 17, 1995).

⁵¹ *Id.*

⁵² Additional statements by political leaders are set out in Appendix C. Attached as Appendix D are statements of other leaders of major institutions (including the ABA, religious groups and labor unions) who support affirmative action.

our history."⁵³ In expressing his support for affirmative action, President James Freedman of Dartmouth College stated:

Given the congressional climate and the fact that we're entering a presidential campaign, you have to be fearful that what is happening in California is going to prompt similar action elsewhere. It would be a tragedy if affirmative action became a victim of presidential politics . . . California is denying the promise of American life to people who have been discriminated against for two centuries. We must be educating men and women of all ethnic groups and all races to govern this country and to contribute to its vitality.⁵⁴

Over the past ten years, polling data has consistently illustrated that the majority of Americans support affirmative action.⁵⁵ As recently as August, 1995, less than three months ago a *USA Today/Gallup/CNN* poll found that 61% of Americans support affirmative action, while only 22% believe that affirmative action should be ended. A *Los Angeles Times* poll from January, 1995 found that 55% of those polled believed that affirmative action programs designed to help minorities get better jobs and education were either "adequate" or "do not go far enough," while only 39% of those polled said affirmative action programs "go too far."

⁵³ Sylvia Castro Uribes, *The Fresno Bee*, Sept. 20, 1995, at B4.

⁵⁴ "Academic Leaders Uphold Affirmative Action," *The Boston Globe*, July 22, 1995, at 1. Additional statements of support by educators for affirmative action and minority scholarships are set out in Appendix E.

⁵⁵ See Gallup Poll (3/92), *Wall Street Journal/NBC* (3/91) and the 3/91 poll commissioned by the National Conference of Christians and Jews.

Indeed, the negative poll results, although always a minority, are themselves affected by distortions which create a bias against affirmative action. For such negative answers must be attributed in part to deceptive tactics used by opponents of affirmative action. In a recent nationwide poll by Louis Harris on the proposed California referendum to end affirmative action, a cross-section of 1364 adults were asked if they favored or opposed the California referendum. The adults were read the exact words of such referendum which are:

The state will not use race, sex, color, ethnicity, or national origin as a criteria for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education, or public contracting.

Please note that nowhere in the referendum is "affirmative action" mentioned. By 81% to 11%, the overwhelming majority favored the California referendum as written. But such 81% included both those who favored and those who opposed affirmative action -- Democrats, Republicans, liberals, women, Latinos and blacks. As Louis Harris has explained, many individuals who favored affirmative action believed that the language as written would prevent racial discrimination against minorities and gender discrimination against females and end those unfair preferences (usually to the disadvantage of minorities and women), such as those based on nepotism.

When those who favored the California referendum as written (the 81%) were then asked if they would still favor the referendum if it outlawed all affirmative action programs in California,

support for the referendum plummeted 52 points, to 29%, and opposition rose from 11% to 58%. When asked if they would favor the initiative if it would discourage or even end programs to help minorities and women to achieve equal opportunities in education and employment, support for the referendum dropped 51 points to 30%. Finally, when asked if they would still favor the referendum if it would discourage or even end programs to give minority- and women-owned businesses a chance to compete with other business in getting government contracts, support for the referendum dropped 50 points, from 81% to 31%, and opposition rose 46 points from 11 % to 57%.⁵⁶

What the Louis Harris poll clearly illustrates is that the public strongly supports affirmative action. What is not revealed explicitly by the poll, but has been reported by Louis Harris, is that individuals responded with anger and resentment when the true intent of the proposed referendum was revealed to them. They felt tricked by the wording of the referendum into voting for something with which they did not agree -- ending affirmative action.⁵⁷

AFFIRMATIVE ACTION SCAPEGOATING

The discussion thus far indicates that it is not affirmative action that causes racial polarization. The question still must be addressed: what does cause starkly different perceptions among

⁵⁶ Peter Y. Harris Research Group, Inc., Women's Equity Poll iv-viii (Apr. 1995).

⁵⁷ *Id.*

white and black Americans? I, like you, am deeply concerned about the recent media reports suggesting that America is becoming more racially divided. I am not sure whether that is actually true, or whether the underlying racial polarization, always there, as never removed since *Plessy* or perhaps since the *Hayes-Tilden* Compromise of 1877, has simply again risen to the surface of public discourse. In any event, it is crucial that we as a country address this perception and work to come together.

I sense that in recent months, some in politics and in the media are attempting to make affirmative action a scapegoat for economic policy failures. For example, there appears to be an effort to make white male Americans believe that job losses are attributable in the main to affirmative action. However, the true reason for job loss is corporate downsizing and a transfer of some types of jobs overseas.⁵⁸ In fact, African Americans lose more than whites in this shrinking of our economy. Also, thoughtful Americans should recognize all of the unmet needs in the United States as opportunities for new jobs here and that more jobs and better wages in the hands of minorities and women create more demand and thus more jobs here.

Let's look at hard facts. In the 1990-91 economic downturn, African Americans employed by the nation's largest corporations

⁵⁸ I am not saying that corporate downsizing is or was wrong or that corporations on occasion should not place some of their manufacturing capacity abroad. Those of us, Republicans and Democrats, who supported NAFTA and GATT believe in the main that additional job opportunities and wealth will be created in the United States.

lost their jobs at a disproportionate rate.⁵⁹ A study of over 35,000 companies, employing more than 40 million employees, revealed that African Americans lost 59,479 jobs, while Asians gained a net 55,104 jobs, Hispanics gained a net 60,040 jobs and whites gained 71,144 jobs.⁶⁰ Black workers suffered nearly one-third of the blue-collar job loss and were the only group to lose service-worker positions despite the fact that new service positions were added. Government downsizing, only now beginning to be felt, also "has a disproportionate impact on blacks and other minorities."⁶¹

Unfortunately, many of the gains African Americans have made through affirmative action are being eliminated by the downsizing of American companies and government. Affirmative action has contributed to the growth of black employment in recent years, thus, layoffs are disproportionately affecting the last hired, *i.e.*, African Americans. In addition, African Americans are concentrated in positions that were most hard-hit: office and clerical, skilled, semi-skilled and laborers.⁶² Affirmative action has not caused the job losses experienced by white Americans.

⁵⁹ Rochelle Sharpe, "Unequal Opportunity: Losing Ground on the Employment Front," *Wall Street Journal*, Sept. 14, 1993, at A1.

⁶⁰ *Id.*

⁶¹ Thomas T. Vogel, Jr., "Job Ax Wound Blacks in Government", *Wall Street Journal*, Aug. 25, 1995, at A2 (for example, 144,000 government jobs held by blacks were eliminated between January and July of 1995).

⁶² *Id.*

Affirmative action, moreover, is not to blame for America's struggle with race relations. America's problem with race surely did not commence with the establishment of affirmative action programs. This country has a shameful history with regard to race relations. We cannot erase the fact that most African Americans' ancestors were brought to this country in chains in the hulls of cargo ships and sold as slaves. Also, the highest court in our land, held in the *Dred Scott*⁶³ case, that blacks had no rights which whites must respect. Again, in *Plessy v. Ferguson*⁶⁴, the Supreme Court continued to interpret the Constitution in a manner which oppressed blacks.

Unfortunately for the United States, most black and white Americans have always been divided. Few live in the same neighborhoods, few go to the same public schools, few socialize with each other, job opportunities still do not exist on the same scale among the races, and many government and private programs which permit people to acquire and accumulate wealth are denied African Americans. What divides America is the continuing pervasiveness of prejudice and discrimination. Prejudice creeps into our daily lives.

In thinking about what causes different perceptions of reality, I have come to the conclusion that another of the causes is a different base of knowledge. Disparities in knowledge are

⁶³ -19 U.S. 393 (1857).

⁶⁴ 163 U.S. 537 (1896).

perhaps most apparent with regard to the criminal justice system. The media can help remedy this knowledge deficit. For example, just this past Friday evening, NBC's *Dateline* program⁶⁵ exposed illegal, oppressive tactics used by a group of white police officers in Philadelphia, directed almost exclusively at low-income African Americans, who were vulnerable and could not fight back and expose the corruption. The actions of this group of white officers included planting evidence, arresting innocent persons for no reason, and searching homes without a warrant. Many innocent persons spent years in jail because of planted evidence or perjured testimony. As a result of the exposure of this corruption, as many as 100,000 arrests and convictions are being reviewed.⁶⁶

The group of white officers responsible for this reign of terror were well-known in Philadelphia's black neighborhoods. Yet, in white Philadelphia, this corruption was totally unknown. It should come as no surprise that different life experiences lead to different perceptions of the world.

For many African Americans, the testimony of Mark Fuhrman struck a nerve, it was another example of police misconduct girded in racism.⁶⁷ It is significant to me that virtually all of our

⁶⁵ *Dateline* (NBC Television Broadcast, Oct. 20, 1995).

⁶⁶ *Id.*

⁶⁷ With respect to the O.J. Simpson case, it seems to me that most of those who appear to be polarized in their reactions to the verdict did not watch the trial and are unfamiliar with the many serious questions about the prosecution's case brought out by the very skilled lawyers for the defense. We must recall that
(continued...)

country's urban riots in the past half-century are traceable to oppressive policing of minority communities. Across this country,

⁶⁷(...continued)

among those most intimately acquainted with all of the evidence, the jury, there were two whites who believed at least that there was "reasonable doubt." And, although I am not a criminal defense trial attorney, in my vast experience with the judicial system an acquittal is hardly surprising when the prosecution's main witness is shown to have committed perjury. The fair-minded public ought to be impressed by the fact that many legal experts, both white and black, who watched the trial continuously, have stated that at least there was enough doubt that reasonable jurors, white or black, could have voted to acquit. See, e.g., Nat Hentoff, "In Defense of the Simpson Jury," *Washington Post*, Oct. 10, 1995, at A13 ("I watched all of the trial. . . . I have reported on many trials--with a particular interest in forensic investigations. . . . Had I been on the jury, I would have come to a verdict in a shorter time. When vital evidence has been so rampantly contaminated and some of the investigating officers--not only Mark Fuhrman--do not have to be in a conspiracy to be disbelieved, it is no wonder that the jury found many avenues of reasonable doubt.").

When Mr. Simpson was acquitted, the photographs of the public jury were worth a thousand words. On news programs and in newspapers across the country, white and black Americans were visibly divided. Whites were upset with the acquittal and blacks were elated. Clearly it was not because they rejoiced in the death of the victims. They had the same sympathy for the victims. There is more senseless killing in African American communities than in white communities. Why so divided? To the extent that whites who did not hear all the evidence react differently than blacks to events such as the O.J. Simpson verdict, I believe that it is a lack of knowledge about the oppressive policing that routinely occurs in African American communities. Hearing just parts of the evidence, whites were much less likely to believe, based upon their past experience, that policemen would lie, could be racially prejudiced or plant evidence. As a result of the acquittal, whites began to raise questions about the competence of majority black juries, conveniently ignoring that there were three non-blacks on the jury. Some even began calls for jury reform.

African Americans were happy, not because two white persons were murdered. Blacks could understand an acquittal, where there was evidence that one of the investigating police officers had admitted using racial slurs and harassment, including the planting of evidence against African Americans. African Americans know that all too often this is reality.

minority communities are routinely subjected to police misconduct, police brutality and unwarranted criminalization of African Americans. When a public event brings this everyday pain to the forefront of the black community's consciousness, the suppressed rage sometimes has tragically turned into riots.

How soon we forget that in 1992, we all watched in horror as Rodney King was dealt 56 blows to the head and body by an all-white group of Los Angeles police officers. In 1993, Los Angeles erupted into flames following the acquittal of the four officers who brutally beat Mr. King.⁶⁸ An African American community in Miami reacted similarly in 1989, to the murder of Clement Leonard, a 23-year-old black male shot by a white police officer. Other acts of police brutality and misconduct have distressed African Americans. In 1984 Eleanor Bumpers, a 66-year-old arthritic-stricken woman was killed by a white police officer. In Detroit in 1992, Malice Green was brutally beaten by two white officers. In Oneonta, New York, in investigating an assault case in which the perpetrator was a black male, State University of New York at Oneonta officials gave police officers the names and addresses of all black male students. Many of the black male students were stopped and searched by police officers; others were questioned by the police.

⁶⁸ The acquittal of the police officers in Los Angeles by an all-white jury enraged a majority of Americans, both black and white, because the beating was captured on videotape, in living color. Thus, it was impossible to differ as to what the evidence showed. This differs from the Simpson case which was based solely upon circumstantial evidence. Yet, many white columnists say they can not understand how African Americans can condemn the Rodney King verdict but not the Simpson verdict. This is not colored driven but simply blindness.

Oppressive policing also creates an atmosphere in which African Americans can be blamed for crimes they did not commit. In 1989, a white man, Charles Stuart, told Boston police that his wife had been murdered by a black man. The Boston Police Department brought in several suspects. Based upon Mr. Stuart's identification, an African American man was arrested. This man was not released until Mr. Stuart's brother-in-law told the police of Stuart's confession. Similarly, in the tragic killings of two children by their mother in South Carolina last Spring, the mother, Susan Smith told investigators that the suspect was an African American male.

There is no doubt that African Americans suffer the bulk of police misconduct and that oppressive legal police tactics are widespread. These facts suggest an approach to me: One way to reduce racial polarization, is to purge our police forces of racial oppression. And we need to act quickly to rid our police departments of the significant numbers of Mark Fuhrmans and his ilk who are still rising through the ranks.⁶⁹ Affirmative action programs can help to diversify police forces in an attempt to

⁶⁹ The "Good Ol' Boys Roundup," attended by as many as 300 federal and local law enforcement officers this past summer, is simply one more confirmation of the attitude many white police officers have toward black communities. This event was reportedly permeated with racism, including the sale of "nigger hunting licenses" and T-shirts with a picture of Rev. Martin Luther King, Jr., in gun-sight cross hairs. *Washington Post*, July 20, 1995, at A10.

foster better relationships with communities previously harassed by the police.⁷⁰

DISCRIMINATION STILL EXISTS

Progress on civil rights and women's rights has been made, in large part because of continued bipartisan support for strong anti-discrimination laws and enforcement measures. Yet, discrimination has not been rooted out of our society. Thus, women, African Americans, Latinos and other hardworking Americans are faced with barriers to their advancement.

Congress has recognized the persistence of discrimination in American society and has acted by strengthening and extending civil rights protections. In the past few years, Congress passed amendments to the Voting Rights Act (1982), and the Fair Housing Act (1988), and has restored laws governing equal employment opportunities (Civil Rights Act of 1991) and discrimination by federally-assisted institutions (Civil Rights Restoration Act, 1988) and established new protections for persons with disabilities (Americans with Disabilities Act, 1990).

Several studies have demonstrated the continued widespread existence of invidious discrimination. The Fair Employment Council of Greater Washington, Inc., conducted a study in which six teams,

⁷⁰ See *Baker v. City of Detroit*, 483 F. Supp. 930, 1000 (E.D. Mich. 1979), *aff'd*, *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983) (upholding a voluntary affirmative action plan, resulting in a diversified police force where claims of brutality were reduced).

each consisting of an equally qualified white and black person, posed as job applicants for the same position. Job offers were given to 46.9% of white applicants as compared to only 11.3% of African Americans. In 16.7% of the instances in which both the white and African American received offers, the white applicant was offered higher wages. White applicants were notified of job vacancies while applying for another position at a rate 48% greater than African American applicants.⁷¹

Using a similar technique, the Department of Housing and Urban Development found that blacks experience housing discrimination 59% of the times they try to buy a home and 56% of the times they attempt to rent a home.⁷² Blacks are twice as likely to be denied mortgages as whites at the same economic level. In 1993, housing discrimination levels were "basically unchanged" from those of the late 1970's.⁷³

Recently, LDF and others settled a case against American Family Mutual Insurance Company, in which the company had refused to provide homeowners insurance in middle-income African American neighborhoods. A district manager for American Family told an

⁷¹ Fair Employment Council of Greater Washington, Inc., "Measuring Employment Discrimination Through Controlled Experiments," *Review of Black Political Economy*, at 23 (Summer, 1994).

⁷² Margery Austin Turner, Raymond J. Struyk, & John Yinger (The Urban Institute & Syracuse University) Housing Discrimination Study 35 (1991) (prepared for the Office of Policy Development & Research, U.S. Department of Housing and Urban Development).

⁷³ *Id.*; J. Linn Allen, "Civil Wrongs; As Blacks Go House Hunting, Too Often The Door Is Closed," *Chicago Tribune*, Nov. 14, 1993, at 1.

agent: "Very honestly, I think you write too many blacks. They can't afford it. You've got to have good, solid, premium-paying white people in your own agency, who own their homes. The whites work. Those are the people you want to go and see." The case settled with \$16.5 million in damages for victims of these practices. A three-year investigation of homeowners insurance sales practices, conducted by the National Fair Housing Alliance, showed that minority callers to insurance companies were often denied service or quoted higher rates than white callers seeking insurance for similar homes.⁷⁴

Other LDF cases demonstrate the pervasiveness of discrimination. In 1994, LDF was involved in a case against the Palm Beach Gardens Florida police department. The case was described by the *Washington Post*: "White officers confessed [in sworn testimony] that the department threw away job applications from blacks, hired whites who lived 50 miles away over blacks who lived nearby and had a chief who admitted to . . . regularly use the term "nigger" -- but claimed it was just like any other word. The department had not hired a black for 30 years, from its founding until 1989. Where it did, it fired him after a year."⁷⁵

⁷⁴ John R. Wilke, "Study Finds Redlining Is Widespread In Sales of Home-Insurance Policies," *Wall Street Journal*, Sept. 12, 1995, at A6.

⁷⁵ Lincoln Caplan, "Why Affirmative Action is Divisive, Difficult -- and Necessary," *Washington Post*, Feb. 12, 1995, at C3.

Discrimination is the principal reason America continues to be divided. We have not fixed this problem, and we surely will not if affirmative action is dismantled.

Also divisive are continuing efforts to pit one group against another. For example, opponents of affirmative action have wrongfully but purposely cast it solely as a black and white issue. This not only makes blacks the enemy, but it also fails to recognize that other groups benefit from affirmative action as well. Women have made tremendous gains through affirmative action. The failure of the media and others to include women's rights in every public exploration of the issue not only marginalizes the role of women in our society, but it also drives a wedge between women and African Americans. We cannot continue to make African Americans the scapegoats. We cannot continue to exclude women from our society. Our elected officials have failed us as a nation if they continue to play politics of divisiveness.

America cannot begin a long over due healing process by eliminating the one measure by which we have begun to ensure equal opportunity for all Americans. Affirmative action brings us together. As a result of affirmative action programs, our institutions of higher learning and our workplaces have been integrated. In addition, more Americans have been able to share in the economic wealth of our country. Affirmative action gives all Americans a stake in our society. It creates a more educated and more productive society. Why would anyone who cares about the

future of our country want to dismantle the strides we have made toward an inclusive society?

As a life-long Republican, I am confident that the Republican party is in favor of equal opportunity and inclusiveness. Republicans have played a major role in the establishment of affirmative action programs because we knew it was the right thing to do in an effort to make America a country in which all citizens are guaranteed an opportunity to achieve the American dream. Affirmative action is still the right thing to do. Affirmative action has not only made our society more inclusive, but has contributed to a more productive society, where more citizens are able to obtain the skills and education to contribute to our ever-changing society. We still have a long way to go to make this society just and free from prejudice and discrimination, but we must realize, recognize and insist that affirmative action has played an extremely positive role in our efforts to reach that goal.

In conclusion, Charles Lamb taught us well when he said: "I could never hate anyone I know."⁷⁶ We are slowly starting to know each other by living in the same neighborhoods, going to the same schools, having the same job opportunities, socializing with each other, etc. Until this nation reaches a point where the effects of past racial and gender discrimination are wiped out and human relations progress, victories and defeats, happen naturally without

⁷⁶ See Alfred Ainger, Charles Lamb 124 (1882).

regard to race, gender, creed or color, affirmative action techniques must be employed to bring about an equal, free and open society.

Mr. CANADY. Thank you, Mr. Coleman.
Mr. Marshall.

**STATEMENT OF WILL MARSHALL, PRESIDENT, PROGRESSIVE
POLICY INSTITUTE**

Mr. MARSHALL. Thank you, Mr. Chairman, members of the committee.

I think it is important to reassess the merits of affirmative action, and specifically, more specifically, of racial and gender and ethnic preferences because I think they're deeply divisive, but I think it's even more imperative that we avoid a compulsive either or debate that further rends our society along racial lines. And for that reason, I think it's almost the beginning of wisdom in this debate to avoid the absolutist positions on either end, either the reflexive defense of the status quo or an equally blind rush to dismantle it. Either of those courses, it seems to me, only leads down the futile path of deepening racial antagonism and polarization.

What I'd like to argue for is a third way in this debate that tries to rebuild a shattered national consensus on equal opportunity and racial justice on the common ground of equal opportunity. I think there's a lot of public support, intuitive public support, for this kind of approach. Opinion and polls that I have looked at suggest that people are uncomfortable with an all-or-nothing choice about affirmative action certainly, and even specifically about preferences.

Speaker Gingrich has repeatedly said that he is not inclined to take an abolitionist position, but wants to know what we're going to replace preferences with. Similarly, President Clinton, while defending in general many of the preference programs, has said changes are necessary to bring them in line with the *Adarand* decision, and as you've pointed out, Mr. Chairman, that process has already begun at the Pentagon.

But the third way that I'm talking about is not an effort to try to split the difference here, but a return to the first principles of American democracy, principles such as that civil rights adhere in individuals, not in groups; that all citizens are entitled to no more or less than equal protection of the laws, and that Government has a responsibility to promote equality as Americans have traditionally understood it in terms of equality of opportunity, as opposed to equality of result. And when you look at these contentious questions through the lens of these shared principles, as opposed to the lens of group rivalry or claims for power, it's clear to me, at least, that affirmative actions or preferences go too far in some directions, but not far enough in other directions.

The emphasis on numerically-driven preferences in Government policy, for example, I believe does contradict the principle of equal protection under the law. On the other hand, I think few would dispute that affirmative action as we know it is failing to lift the minority poor, particularly in our cities, whose moral claim on society to me is compelling.

These twin defects suggest an opportunity to strike a new bargain on racial justice and equality. That bargain requires each side to make a key stipulation. It seems to me the critics of preference and affirmative action have to acknowledge the legacy and lingering presence of racial bias. It remains an enormous obstacle for

black Americans, particularly those who are stranded in the inner cities, and defenders of affirmative action I believe ought to concede that over the long haul preferences can't be the sole or even main answer, because their reach is too limited and because they make it more, rather than less, difficult to transcend racial difference.

The essence of a new bargain here, it seems to me, is to trade over time the policies of group preference for a new agenda for individual empowerment. The first step in that bargain would be to phase out the mandatory preferences in Government and reinforce voluntary affirmative action by private employers. I believe that Congress and the President ought to restore affirmative action's transitional and remedial character by setting termination dates for all Federal contract set-asides and other numerically driven goals in procurement and Government contracting. And I think it's also time to repeal the 1965 Executive order and the subsequent regulations that require Federal contractors to adopt goals and timetables in hiring. In practice, I think these kinds of guidelines encourage employers to hire women and minorities on a rigidly proportionally basis.

But at the same time, we ought to encourage voluntary affirmative action in the private sector, where most jobs and opportunities lie, after all, and where the battle for equal opportunity will ultimately be won. Fortunately, most major American companies actively recruit minorities and women because they understand diversity is a competitive advantage in an increasingly multiethnic society. And that kind of voluntary action, backed by strong enforcement of antidiscrimination laws, I think avoids the inflexibility of bureaucratic mandates that lead to de facto quotas.

The model, it seems to me, ought to be how America avoided the kind of religious conflicts that embroiled Europe in wars for centuries about the time right before the founding of our country. What we decided then was to separate church and state, and precisely because today our country is far from being colorblind, I think it's important that Government not institutionalize racial classifications and enforcement through its policies. So I think it's essential that we move toward a new regime in which we separate race and state in the same way that we separated church and state in terms of Federal policies.

The second step is, as I've stressed several times, to replace these preferential policies with a new agenda for empowerment. It seems to me that the legacy of racism that Congressman Frank referred to at the outset of this hearing is starkly reflected in the fact that black Americans are twice as likely as whites to be jobless; they're disproportionately poor and dependent on welfare, and they're trapped in decaying and dangerous public housing and condemned to lousy public schools, and that unequal resources and opportunities for the minority poor, rather than preferences, ought to be at the center of the civil rights agenda for the 1990's. I'd even argue that affirmative action is kind of a relatively cheap and ineffective substitute for the broad-scale agenda for economic empowerment aimed at the urban that this country has to undertake.

Empowerment is potentially, obviously, very broad and encompasses everything from welfare to school reform to national service and apprenticeship, and other ideas for expanding access to edu-

cation and training, but I think it would be especially fitting for us to focus immediately on the economic legacy of discrimination, on the systematic exclusion from full participation in the free-enterprise system that black Americans have suffered for so long, and this legacy includes lower rates of business formation with asset accumulation and of property and inheritance, and especially of homeownership, and I can elaborate on specific proposals later, if there's time.

Let me parenthetically say that I also support affirmative action in college admission. I think some reforms are needed there, but, essentially, I think there's a much stronger case for continuing some kind of affirmative action, even preferences, in college admissions than in Federal policies.

But at this time of fiscal retrenchment, will the public be willing to redirect significant resources, or even pony up new ones, for an empowerment agenda? No one really knows, but a majority of people polled consistently say that Government has an obligation to help expand opportunities for the minority poor, findings that we've heard confirmed here today. And what's tragic about this current deadlock on affirmative action to me is that it blocks attempts to build a new biracial and bipartisan consensus behind the comprehensive attack on innercity poverty.

Mr. Chairman, if you'll permit me, I'll close with a political observation. For African-Americans, I think affirmative action clearly symbolizes a national commitment to redress centuries of racial oppression and injustice, and while it's important that some affirmative action policies be changed, reformed, perhaps even eliminated, it's even more important that our Nation not abandon that moral commitment.

Some conservatives have charged—and I think with some justice—that some on my side of aisle, liberals and progressives, Democrats, have acquiesced in perversion of the original intent of affirmative, which was to insure equal treatment, not preferential treatment, or parity. On the other and, it seems to me that many Republicans have been more interested in playing wedge politics than in reclaiming the racially progressive legacy of the party of Lincoln. And now many Republicans swear that they support equal opportunity with as much fervor as they oppose quotas and preferences. It's easy for people on my side to be very cynical on that score when Congress is busy cutting social programs and programs that benefit low-income people generally.

And it seems to me an absolutely critical question for this panel and this Congress is, as the Republicans move from a position of opposition to one of governing responsibility, in what ways are they willing to translate this rhetorical commitment to equal justice into an effective public agenda for action? The empowerment agenda can't be financed by curbing waste and abuse in social programs, in my view. It will cost real money and it will require real sacrifices from all of us as taxpayers, and, frankly, to break the impasse on this issue, I think that this Congress needs to make an earnest, a good faith; what are we willing to really devote to countering the horrendous conditions facing poor Americans in the innercities? If we were willing to talk about, we really—really more

to the point, conservatives give defenders of affirmative action few reasons to reconsider their defense of the status quo.

In his 1963 speech during the march on Washington, Dr. Martin Luther King said that the Constitution and the Declaration of Independence constitute a promissory note to which every American, white and black, fall heir. It seems to me that black Americans are still holding that promissory note, and it's neither realistic nor right to ask people who have been shortchanged for centuries to give up something for nothing.

So I just would end by reiterating my appeal to this committee to think seriously, not just about ending race and gender preferences, but about replacing them with a new commitment to equal opportunity.

Thank you.

[The prepared statement of Mr. Marshall follows:]

PREPARED STATEMENT OF WILL MARSHALL, PRESIDENT,
PROGRESSIVE POLICY INSTITUTE

Mr. Chairman, I appreciate the opportunity to testify on the future of affirmative action. Major changes in affirmative action are both necessary and, given the changing political landscape, inevitable. What's crucial now is to act in ways that close rather than widen the chasm of mistrust that has opened between white and black Americans. In that spirit, I urge you to reject calls to simply scrap affirmative action without putting something better in its place. I think the challenge now is to strike a new bargain on affirmative action that shifts the focus of government's efforts from group preferences to individual empowerment.

Affirmative action faces triple jeopardy: a skeptical Supreme Court, a hostile Republican Congress, and the possibility of a first-ever popular vote next year in California, where opinion is running heavily against preferences based on race and gender. With many whites losing patience with preferences and many blacks afraid of losing hard-won ground, there's a growing risk of a convulsive "either or" debate that rends society along racial lines. What's needed is a third way that honors our moral commitment to equal opportunity without further depleting our civic reserves of interracial trust and goodwill.

Although affirmative action also affects women and other ethnic groups, it divides Americans most dramatically along racial lines. In *The Scar of Race*, Paul Sniderman and Thomas Piazza write that: "The new race-conscious agenda has provoked broad outrage and resentment. Affirmative action is so intensely disliked that it has led some whites to dislike blacks—an ironic example of a policy meant to put the divide of race behind us in fact further widening it."¹

The Supreme Court touched these raw racial nerves in a series of decisions in June that tightened rules for federal set-asides, school desegregation, and racial gerrymandering. As conservatives gleefully forecast the beginning of the end for the

¹Sniderman, Paul and Thomas Piazza. 1993. *The Scar of Race*. Cambridge, MA: Belknap Press, p. 109.

"racial spoils system," defenders of affirmative action were apoplectic. Jesse Jackson even likened the high court to the Ku Klux Klan: "While we react to those wearing white sheets, those wearing black robes are killing our dreams and our justice."²

Left-right hyperbole aside, for many black Americans affirmative action remains a potent symbol of the nation's enduring commitment to racial equality. Opposition to race-conscious policies, many suspect, is really a form of racial denial—of wishing away a deep and persistent racism woven into the fabric of American life. Having been shortchanged for centuries, many black Americans are reluctant to give up set-asides or hiring preferences without getting something tangible in return. And they are understandably outraged by conservative attempts to make "reverse discrimination" the overriding civil rights issue of the day.

Unfortunately, the symbolism is equally powerful in a negative way for most white Americans, women as well as men. Wary of race-conscious policies from the start, their skepticism has hardened as remedies originally justified as limited and temporary have congealed into a permanent, creeping regime of group classifications and favoritism. Cast as the villains in the affirmative action morality play, white working men naturally enough resent the prospect of being denied a job, a promotion, or a slot in college simply because they're white. (Many Asian-Americans likewise fear that affirmative action imposes an artificial ceiling on their ambitions.)

But their more fundamental objection has to do with the essential fairness of the American system of competitive enterprise. Put simply, they think that success or failure should reflect individual merit, not group membership or attempts by governing elites to dispense privileges on the basis of ethnic politics.

Are we, then, careening toward an irreconcilable conflict between racially distinct conceptions of justice? Not necessarily. Opinion surveys suggest that many Americans seem uncomfortable with the all-or-nothing choice being foisted upon them by liberals who believe that pulling on any loose thread will unravel the entire fabric of civil rights and by conservatives who imagine that their belated embrace of the principle of color-blindness can somehow wipe the historical slate clean of hundreds of years of racial oppression.

While racial and ethnic demagogues on all sides insist there is no middle ground on affirmative action, that's where most Americans instinctively repair. A July 1995 CNN/USA Today poll gave respondents three options: "basically fine the way it is"; "good in principle but needs to be reformed"; and "fundamentally flawed and needs to be

²National Rainbow Coalition News Release, June 12, 1995, p. 1.

eliminated." Sixty-one percent said they would reform affirmative action policies; 22 percent would scrap them; and only 8 percent favored leaving existing policies intact.³

Key political leaders likewise are groping for a third way in the affirmative action debate. House Speaker Newt Gingrich, while adamantly opposed to race and gender preferences, has eschewed the purely negative stance adopted by many Republicans. "I'd rather talk about how do we replace group affirmative action with effective help for individuals, rather than just talk about wiping out affirmative action by itself," he said in April.⁴

In a major address on affirmative action in July, President Clinton largely reaffirmed the status quo, although he did concede that some changes are necessary, if only to bring federal policies into line with new Supreme Court guidelines.⁵ The speech won unanimous praise from liberal elites but failed to address the public's doubts about the basic fairness of race-conscious policies. By failing to draw a distinction between the morally unimpeachable end of racial equality and the morally dubious means of race preferences, the President also missed an opportunity to challenge conservatives to join in the search for alternative ways to promote equal opportunity.

Conventional wisdom has it that the Republicans have everything to gain and nothing to lose by using affirmative action as a wedge to split Democrats' biracial coalition. Yet not all Republicans are ready to replace their portraits of Abraham Lincoln with pictures of Jesse Helms: Jack Kemp and Bill Bennett, for example, have warned GOP presidential hopefuls that they could gravely harm the party by whipping up racial passions to win elections. Many Republicans swear they support equal opportunity as fervently as they oppose quotas; now is the time to find out what they're willing to do to make that commitment tangible. By refusing to countenance necessary changes in affirmative action, however, liberals let conservatives off the hook and risk losing everything.

The affirmative action debate touches on two urgent public questions—one about our country's past, the other about its future. The first concerns the perennial American dilemma of race, or how to pay an historical debt to black Americans without generating fresh racial grievances in the process. The second question looks ahead to America's future as a multiethnic democracy, or how to accommodate the nation's growing diversity without validating an ethnocentric politics that threatens to fracture society.

³See also Morin, Richard and Sharon Warden. "Americans Vent Anger at Affirmative Action." *The Washington Post*, March 24, 1995, p. A1. The poll also posed three choices: leave affirmative action policies as they are, change them, or do away with them entirely. Forty-seven percent said they would change affirmative action policies; 28 percent would scrap them; and only 23 percent favored leaving existing policies intact.

⁴Kahlenberg, Richard D. "Equal Opportunity Critics." *The New Republic*, July 17, 1995, p. 20.

⁵"Remarks by the President on Affirmative Action." The White House, Office of the Press Secretary, July 19, 1995, p. 9.

As these questions suggest, what's missing from the debate is a civic perspective that rises above race or other group identity to consider the interests of society as a whole. Such a view grants neither side a moral monopoly; rather, it acknowledges the tensions inherent in affirmative action and rejects the all-or-nothing choice posed by absolutists in either camp. The search for a third way, however, doesn't entail split-the-difference compromises. It starts by reaffirming the basic tenets of U.S. liberalism: that civil rights inhere in individuals, not in classes or groups; that all citizens are entitled to no more or less than the equal protection of the laws; and that government has a responsibility to promote equality as Americans have traditionally understood it—as equality of opportunity rather than equality of result.⁶

Seen through the lens of shared principles rather than group rivalry, affirmative action appears to go too far in some directions and not far enough in others. The emphasis on numerically driven preferences, for example, ineluctably contradicts the principle of equal protection. On the other hand, few dispute that affirmative action as we know it fails to lift the minority poor, whose moral claim on society is strongest.

These twin defects suggest an opportunity to strike a new bargain on racial equality and opportunity. It requires that each side make a key stipulation: Critics of affirmative action should acknowledge that the legacy and lingering presence of racial bias remain significant obstacles to black progress, especially the poorest African-Americans stranded in inner cities. Defenders of affirmative action should concede that preferences cannot be the answer because their reach is too limited and because they make it more rather than less difficult to transcend racial difference.

Reducing the significance of race, looking beyond the color of our skin to our common humanity—this, after all, was the essence of Dr. Martin Luther King's celebrated dream. He invoked the liberal spirit of the Declaration of Independence and demanded that Americans live up to their beliefs in individual liberty and equality before the law. Dr. King's moral vision, not the current push for race-conscious preferences and group entitlements, remains the surest lodestar for a society still struggling to overcome the traumatic legacy of racial subjugation.

In that spirit, I propose a new bargain on equal opportunity that trades group preferences for individual empowerment. Such a bargain entails three steps:

- First, phase out mandatory preferences in government and reinforce voluntary affirmative action by private employers.

However benign the intention behind them, today's race-conscious preferences or "positive discrimination" contradict the principle of equal protection and therefore can be justified only as temporary, narrowly tailored remedies to past discrimination.

⁶Lipsset, Seymour Martin. "Equality and the American Creed: Understanding the Affirmative Action Debate." *Progressive Policy Institute*, June, 1991, p. 1.

Moreover, they put government in the business of institutionalizing racial distinctions, hardly a good idea for a democracy held together only by common civic ideals that transcend group identity. Congress and the President should restore affirmative action's transitional and remedial character by setting termination dates for all federal contract set-asides and other numerically driven goals in procurement and government employment. It's also time to repeal Lyndon Johnson's 1965 executive order and subsequent federal guidelines that require federal contractors to adopt minority hiring "goals and timetables." In practice, such guidelines encourage employers to hire women and minorities on a rigidly proportional basis.

Alternatively, we should bolster voluntary affirmative action in the private sector, where most jobs and opportunities lie and where the battle for equal opportunity must ultimately be won. A new bargain must include the resources necessary to ferret out discrimination in employment and housing and enforce anti-bias laws. Fortunately, most major U.S. employers actively recruit minorities and women because they see diversity as a competitive advantage in an increasingly multiethnic society. "Diversity management" is well-entrenched in corporate culture. Such voluntary action, backed by strong anti-discrimination laws, avoids the inflexibility of bureaucratic mandates that lead to *de facto* quotas.

- ▶ Second, replace government preferences with new policies intended to empower poor individuals and communities.

The legacy of racial discrimination today is most starkly reflected in the fact that black Americans are disproportionately poor, more likely to be jobless, dependent on welfare, trapped in decaying and dangerous public housing, and condemned to lousy public schools. Unequal resources and opportunities for the minority poor rather than preferences that mainly benefit middle-class minorities and women should top the civil rights agenda in the 1990s. Indeed, affirmative action is a relatively cheap and ineffective substitute for a broad-scale agenda of economic empowerment aimed especially at the urban poor. Such an agenda should begin by radically lifting the quality of inner-city schools and creating a more effective occupational learning system that links schools to private employers.

New public investments are also required to help low-income families save and build personal assets, start businesses, and become homeowners. At a time of fiscal retrenchment, will the public be willing to redirect resources for these purposes? No one knows, but a majority of people polled consistently say government has an obligation to help compensate the minority poor. This much is certain: The debate over affirmative action stands in the way of building a new public consensus behind a course of economic empowerment.

- ▶ Third, base affirmative action in college admissions on need as well as race, and lift students rather than lower standards.

Notwithstanding the University of California's recent decision to end all ethnic and gender preferences, the case for continuing affirmative action is strongest in college admissions. One reason is that too many minority kids come from broken families and are handicapped by the abysmal quality of inner-city schools. Another is continuing racial and ethnic disparities in standardized test scores and grades, which only partially predict performance but wield decisive influence in determining who gets to go where. But the most important reason is education's democratizing mission. It is the incubator of civic equality, exposing people from different backgrounds to one another and giving them a chance to compete on a roughly equal footing. This is especially true now, as a college degree has become a minimal credential for competing in a new, knowledge-intensive economy.

Graduating from Yale probably opens more doors than graduating from State U. In general, however, colleges prepare people to compete; they don't predetermine the outcome of market competition. Nor has entrance traditionally been based on ruthlessly meritocratic standards; on the contrary, colleges have traditionally given preferences to the children of alumni or faculty, to applicants from other parts of the country or world, to athletes, musicians, and others. Under such circumstances, it's difficult to argue with the Supreme Court's *Bakke* ruling in 1978 that race can be a factor but not the main factor in deciding who is admitted to college.

Still, two reforms are necessary here as well. First, affirmative action in admissions should be based on need as well as race; that is, targeted to people from low-income families or to students who are the first in their family to attend college. There's no reason for blacks or women from middle-class families to get a preference over a poor white or Asian student. Second, instead of simply lowering standards to meet diversity goals, colleges should take extra steps to lift affirmative action students to the standards they must meet to succeed. Otherwise, affirmative action merely sets up minority students for failure and may also compromise academic standards.

An elaboration on these steps follows:

Step 1: Phase Out Mandatory Preferences

The President and Congress should start refocusing affirmative action by phasing out mandatory preferences in contract set-asides, public jobs, and hiring by private firms that do business with the government.

According to the Congressional Research Service, the federal government operates 160 race and gender preference programs.⁷ The largest category is set-asides, in which agencies typically allot 10 percent or more of federal contracts to businesses owned by minorities or women. The Supreme Court's recent *Adarand* decision dramatically raised

⁷"Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preference Based on Race, Gender, or Ethnicity." Congressional Research Service, Feb. 17, 1995.

the hurdle for justifying all racial and ethnic classifications and policies. Henceforth, set-asides and other numerically targeted preferences must be narrow in scope, limited in duration, pegged to specific findings of past discrimination, and diffuse in the burden they place on non-protected groups. It is doubtful that many federal preferences can survive the Court's new standard of "strict scrutiny." President Clinton also has called for tightening up on abuses in set-asides, such as white contractors who suddenly discover they have Native American ancestors or give their wives title to the business in order to qualify as a minority-owned enterprise.

Like welfare or other government transfer programs, set-asides are essentially redistributive. They steer public resources to minority businesses but do little to develop the skills that would allow those concerns to prosper independent of government. A study by the General Accounting Office shows that the longer companies stay in Small Business Administration's Section 8 (a) set-aside program, which is the model for most federal set-asides, the less likely they are to develop outside business that would sustain them when they no longer get non-competitive government contracts.⁸

Instead of rigging the competition for public contracts, affirmative action should help minority businesses compete on even terms. In the wake of the Supreme Court's 1989 decision striking down a Richmond, VA set-aside program, Birmingham, AL has jettisoned its contract set-asides and is working instead with the business community to nurture minority-owned enterprises. This voluntary model builds the capacities that allow minority businesses to stand on their own in market competition rather than using public resources to shield them from that competition.⁹

It's also time for Congress to end the bidding discounts, tax credits, and set-asides the Federal Communications Commission uses to encourage minority- and female-owned businesses in telecommunications. There's little evidence that such preferences have achieved their stated purpose of promoting "minority views" in broadcasting; the content of broadcasting is determined by what people want to see or hear, not by the complexion or sex of company owners. And as Jeff Rosen points out in *The New Republic*, even large and successful minority businesses are eligible for set-asides for cellular licenses.¹⁰ Why do they need a boost from government?

Census figures show that minority- and female-owned enterprises are growing rapidly.¹¹ In keeping with the principle that group preferences should be limited and

⁸England-Joseph, Judy. "Status of SBA's 8(a) Minority Business Development Program." General Accounting Office, March 6, 1995, p. 2.

⁹Barrett, Paul M. "Birmingham's Plan to Help Black-Owned Firms May Be Alternative to Racial Set-Aside Programs." *The Wall Street Journal*, Feb. 27, 1995, p. A14.

¹⁰Rosen, Jeffrey. "Affirmative Action: A Solution." *The New Republic*, May 8, 1995, p. 23.

¹¹Mehta, Stephanie N. "Affirmative Action Supporters Face Divisive Problem." *The Wall Street Journal*, June 2, 1995, p. B2.

transitional, we should begin phasing out set-asides over, say, a five- to 10-year period. During that period, we should begin phasing in new empowerment initiatives of the kind discussed below.

In addition, President Clinton should repeal Lyndon Johnson's 1965 Executive Order 11,246, which requires federal contractors to file written plans with the government specifying hiring goals and timetables. This is the federal government's largest affirmative action program. Studies by Jonathan Leonard of the University of California and others show that the executive order has only modestly increased black employment and income, while having little effect on women. Even where gains are posted, they often stem from a shift in employment from firms with no government business to federal contractors. Although the law bans formal quotas, government guidelines push employers to hire by the numbers to avoid the inference of discrimination.

Steady progress by minorities and women in public employment also suggest that we can safely dispense with hiring preferences in government. Blacks are actually overrepresented in federal government (17 percent of the workforce compared to 10 percent of the private workforce) and many big-city governments as well; women are at 40 percent of the federal workforce and growing.¹²

At a time when governments everywhere are in the throes of reinvention and downsizing, it makes little sense to steer women and minorities toward public employment or contracting. Writing in *The New Democrat*, Joel Kotkin notes that in California, affirmative action tends to channel minorities and women to relatively stagnant sectors of the economy—to government and large corporate bureaucracies instead of to dynamic small- and mid-sized firms that are generating most innovation and job growth in the state.

Voluntary Affirmative Action

Since most jobs and lucrative opportunities are found in the private economy, voluntary affirmative action by employers clearly will do more to equalize opportunities for minorities and women than government set-asides and preferences. Most large companies actively seek to diversify their workforce and small employers are under social and legal pressure to do the same. In addition to barring outright discrimination, the Civil Rights Act of 1964 (in Title VII) permits companies to be sued when they *unintentionally* discriminate—when their hiring and layoff policies result in a "disparate impact" on women and minorities. (The Civil Rights Act of 1991 restored the burden of proof on employers to justify such practices on the basis of business necessity.) This "rebuttable presumption" acts as a safeguard against unconscious discrimination but, unlike government's numerical goals and timetables, does not induce employers to hire or fire by the numbers.

¹²"Central Personnel Data File." United States Office of Personnel Management, September 1993.

As part of any effort to reform affirmative action, President Clinton should challenge Congress to give the Equal Employment Opportunity Commission (EEOC) the resources it needs to sift frivolous from serious bias claims and to detect patterns of job discrimination. At the same time, however, Congress should direct the EEOC to avoid actions—such as using computer models to fix the supposedly "exact" percentages of qualified women and minorities available to employers in a given location—that compel companies to adopt race or gender proportionalism to avoid official harassment.¹³

Since anti-discrimination litigation is time-consuming and costly, it makes sense to explore alternatives for reinforcing voluntary affirmative action. A useful tool is the "employment and housing audit" pioneered by the Urban Institute, as described earlier. Increasing their frequency—say, by giving government grants to community groups—would aid in detecting discrimination, but the increased prospect of being audited would also act as a deterrent to employers and landlords. Consumer boycotts and other forms of public suasion have also proved effective at encouraging laggard firms to hire minorities.

Step one in reforming affirmative action, then, is to shift from mandatory preferences to voluntary action by employers, with anti-discrimination laws and public scrutiny as an insurance policy against backsliding. By itself, this step won't quell the controversy over race and gender preferences; it won't console whites who believe they've lost a job or promotion or a slot in medical school because of affirmative action. But it will get the government out of the business of group classification and preferences, halting a trend that promises heightened ethnic conflict.

Dubbing this approach "the separation of race and state," the weekly *Economist* recently pinned the key point:

"It is true, of course, that race distinctions will not disappear from society simply because governments decline to recognize them. But it is equally true, and even more important, that race distinctions cannot disappear so long as governments not merely recognize but enforce them."¹⁴

Step 2: Replace Preferences With Empowerment

If race and gender preferences commit government to a divisive and ultimately futile quest for equal results, the answer is not simply to jettison them but to get serious about making equal opportunity a reality for America's minority poor. Step two in the new bargain is therefore to replace government preferences for groups with new public policies that empower individuals to get ahead regardless of race, gender, or ethnicity.

¹³Bovard, James. "The Latest EEOC Quota Mandate." *The Wall Street Journal*, April 27, 1995, A14.

¹⁴"A Question of Colour." *The Economist*, April 15, 1995, p. 13.

Most studies confirm that the impact of preferences on minority or female employment and income is exceedingly modest. For example, a report on black economic gains prepared for the U.S. Labor Department reached this conclusion:

"The general pattern is that the racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative action) as during the 20 years afterward. This suggests that the slowly evolving historical forces we have emphasized in this report—education and migration—were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains about this long-term trend."¹⁵

Moreover, as sociologist William J. Wilson has pointed out, affirmative action policies exhibit a class bias that favors middle-class professionals and entrepreneurs while offering little to people stuck in poverty.

In a seminal article titled "The Competitive Advantage of the Inner City," Michael Porter of the Harvard Business School argues for shifting public resources from transfer payments, subsidies, and race and ethnic preferences to efforts to create businesses in the inner city. Preferences, he notes, rarely benefit companies located in low-income neighborhoods:

"In addition to directing resources away from the inner city, such race-based or gender-based distinctions reinforce inappropriate stereotypes and attitudes, breed resentment, and increase the risk that programs will be manipulated to serve unintended populations."¹⁶

What's tragic about the current impasse on affirmative action is that it blocks attempts to build a new biracial consensus behind a comprehensive attack on inner-city poverty. For blacks trapped at the bottom of the economic pyramid, the main obstacle is not vestigial discrimination but the breakdown of critical social and public institutions, chiefly the family and schools. Can anyone doubt that dramatically lifting their academic and occupational skills would have a greater impact on their life prospects than maintaining preferences that mostly benefit middle-class blacks, Hispanics, and women?

Empowerment is a broad agenda that encompasses everything from welfare reform to national service, youth apprenticeship, and other ideas for expanding access to education and job training. But it would be especially fitting to focus immediately on the *economic* legacy of discrimination—on the profound and lasting impact on minority citizens of their systematic exclusion from full participation in the free enterprise system.

¹⁵Smith, James P. and Fink R. Welch. "Closing the Gap: Forty Years of Economic Progress for Blacks." The RAND Corp., February 1986, p. 99.

¹⁶Porter, Michael. "The Competitive Advantage of the Inner City." *Harvard Business Review*, May 1995, p. 55.

This legacy includes lower rates of business formation, of asset accumulation and inheritance, and especially of home ownership.

- **Asset-building strategies.** According to the Census Bureau, the distribution of personal assets (property, savings, and investments) by race is even more skewed than the distribution of income: Whites possess 92 percent of Americans' total net worth while blacks have only 3.1 percent.

When it comes to building personal assets, middle-class Americans already benefit from "affirmative action" in the form of the mortgage interest deduction and tax breaks for private pensions and savings accounts. Yet our social policies, especially welfare, promote consumption rather than asset accumulation. An empowerment strategy should offer poor families similar incentives to save and build personal assets. Michael Sherraden of St. Louis University has proposed an asset accumulation system open to all Americans, but with special incentives for the poor. It would create Individual Development Accounts (IDAs), tax-free savings vehicles for low-income families whose deposits could be matched by government, businesses, churches, and charities. The Corporation for Enterprise Development has designed a National IDA Demonstration that would create 100,000 IDAs for low-income families at a cost to the federal government of \$100 million.

- **Home ownership.** Our homes are the most important asset most of us will ever own. Stable communities, moreover, are rooted in high rates of home ownership. While 67 percent of whites own their own homes, only 45 percent of blacks do.¹⁷ Instead of dismantling the U.S. Department of Housing and Urban Development (HUD), as some Republicans propose, why not reorganize it around the goal of lifting home-ownership rates among the poor generally—a shift that would disproportionately benefit the minority poor? HUD can promote home ownership by shifting dollars now spent on rental subsidies (the total exceeds \$10 billion) toward grants to local governments to clear sites for construction of low-cost housing and cut mortgage interest rates for owner-occupant buyers in poor neighborhoods.¹⁸ Localities should also revise building and housing codes to make it easier to build low-cost housing.
- **Public education.** Finally, no public task is more urgent than dramatically lifting the quality of inner-city schools. More money may be necessary but it will be insufficient: Big city school districts typically spend well above the national average. More important is to change the bureaucratic organization and culture of our standardized public school system.

¹⁷Statistical Abstract of the United States. 1994. Washington, DC: GPO, Table 1216, p. 735.

¹⁸Ilusock, Howard. "Up From Public Housing." *The New Democrat*, January/February 1995, p. 50.

The first step is for the states: They should withdraw the local school districts' monopoly on owning and operating public schools, freeing teachers and other civic entrepreneurs to create innovative public schools. Now operating in 12 states, such "charter" schools expand choices for parents and children while exerting real competitive pressure on traditional schools, who risk losing students (and public funding for them) if they fail to improve. Unlike conservative proposals to privatize public schools through vouchers, charter schools operate under license to public authorities without the stifling rules and procedures of central school districts and unions. The federal government can help boost these efforts by letting the states use federal education dollars to experiment with models and help capitalize new schools.

These initiatives are modest in cost if not in scope. But they are only the beginning. Ultimately, the only way out of the quagmire of group-conscious policies is to redouble the nation's commitment to equal opportunity for all. This requires not only vigilance in combatting residual discrimination, but also positive steps to lift the prospects of poor people packed into decaying urban neighborhoods. Conservative critics of preferences have ignored both these moral imperatives and the public costs they imply. No wonder their calls for a color-blind Constitution and society ring hollow to Americans for whom discrimination is not an abstraction but a painful reality.

In pursuing a third way on affirmative action, we must be clear on this point: redeeming America's historical obligation to the victims of slavery and segregation is not a cost-free proposition. A serious agenda for equal opportunity and individual empowerment will require financial sacrifice from society as a whole.

Step 3: Reform Affirmative Action in College Admissions

The third step involves college admissions, where the abysmal quality of many inner-city schools, continuing racial and ethnic disparities in standardized test scores, and the special role Americans have traditionally assigned to education in equalizing opportunities combine to justify some form of affirmative action. Nonetheless, two reforms are essential: 1) we must lift students rather than lowering standards; and, 2) we must target students by need as well as race.

U.S. colleges compete for promising minority students almost as furiously as for star athletes. The dearth of candidates with high test scores creates pressure to lower official standards to meet affirmative action goals. On scholastic aptitude tests (SATs), for example, blacks score on average (combined math and verbal) nearly 200 points below whites. This has prompted protests and lawsuits from white and Asian students denied entry despite higher grade point averages and SAT scores.

Such measures, while useful, are not comprehensive or infallible predictors of future performance. Moreover, few colleges base admissions solely on meritocratic standards. Many take non-academic activities into account: participation in sports, clubs, student government, or civic work. Others give preferences to the children of alumni or faculty, limit local enrollment to leave space for students from other parts of the country,

and offer special scholarships for students from low-income families. Under such circumstances, it is difficult to argue that colleges may consider any factor *except* race, ethnicity, and gender. The right standard is still set by the Supreme Court in its 1978 Bakke decision: Race should be a factor but not the decisive factor in college admissions.

Too often, however, accepting ill-prepared students under affirmative action plans sets them up for failure and reinforces stereotypes of intellectual deficiency not only held by whites but also internalized by minorities. Studies show that only one-third of black students who enter college graduate within six years, compared with 57 percent for whites.¹⁹ It's not just students who suffer: Institutions that allow the quest for diversity to compromise academic excellence risk repeating the descent of New York City's College, once the "Harvard of the proletariat" and now a venue for ethnic politics.

Given the disparity in test scores, how can colleges lift students rather than lower standards? One way is to adopt the military model of affirmative action that sociologist Charles Moskos says has made the army the most successfully integrated institution in America. This model combines goals (but not timetables) for minority promotion with rigorous training to ensure a sufficient pool of qualified candidates for promotion. Some colleges already are trying similar approaches: Boston College enrolls affirmative action students in a six-week summer training course and requires that they sign a contract pledging to make every effort to graduate. The results are impressive: 95 percent of these students graduate in four years, compared to 88 percent for the entire student body.²⁰ An alternative is to guarantee all high school students a slot in community colleges to prepare them for entry into more demanding four-year schools.

Colleges should also work more closely with high schools to create preparatory programs for minority students. In California, for example, officials estimate that only five percent of black and four percent of Latino public high school students complete the course and grade requirements necessary for admission to the University of California. But eligibility for both groups swells to over 40 percent when students are enrolled in preparatory courses.²¹

University officials worry, however, that the proposed CCRI would prohibit such programs because they do not meet its standard of pure color-blind neutrality. Nor, of course, would race-conscious recruiting of promising minority students—and indeed the architects of the initiative admit that it would lead to a dramatic drop in minority enrollment in top-ranked schools.

¹⁹McGrory, Brian. "Pathways to College - Affirmative Action: an American Dilemma." *The Boston Globe*, May 23, 1995, p. 12.

²⁰Ibid., p. 12.

²¹Rogers, Kenneth. "Don't Lower the Bar - Elevate the Students." *The Los Angeles Times*, March 10, 1995, p. B7.

The second problem posed by affirmative action in college admissions is that it ignores wide income variations among members of a group. It's hard to defend giving an advantage to Bill Cosby's kids, to an engineer who recently emigrated from Peru or India, or to an affluent white woman over the son of a proverbial white coal-miner or a recent Russian immigrant. Some argue that the purpose of affirmative action is not just to widen opportunities but to indemnify people for historic wrongs. Since college slots are not unlimited, however, it makes sense to target preferences to people who really need them—to kids who are the first in their family to go on to higher education, for example, or to those from poor or working poor families.

Simply substituting class for race as the basis for affirmative action runs afoul of the test-score gap; the likely result would be to make poor whites and Asians the main beneficiaries. The better solution is to combine the two as a means of targeting affirmative action to truly needy members of minority groups. Since colleges already collect lots of financial information from students seeking loans, grants, or scholarships, tempering affirmative action with a means test shouldn't be hard.

All this raises an obvious question: If preferences are wrong in public contracting, why are they permissible in college admissions? One answer is that colleges have a broader public mission than career preparation and meritocratic sorting. Americans have always believed that education is the key not only to opportunity but to an enlightened citizenry capable of self-government. Since World War II, we've invested heavily in college opportunity because we see it as integral to both economic growth and equality. This is even more true today, as the global information economy puts a premium on knowledge and mental agility.

Affirmative action in college is not a guaranteed outcome but an opportunity to develop civic capacities and compete successfully in the economic arena. Like other race-conscious preferences, it should be viewed as a temporary expedient until representation of minorities in colleges is roughly equivalent to that of whites. In the meantime, it should be done in ways that don't compromise academic standards or confer benefits on people who are not needy.

Conclusion

At the heart of the affirmative action debate are conflicting interests and visions of justice that divide largely on racial lines. There is, however, a third option—a civic perspective that works to synthesize these visions into a new bargain on racial justice and equal opportunity. The moral underpinning of such a bargain is Dr. King's vision of a society that judges individuals by "the content of their character" rather than the color of their skin.

A recent series of articles in *The New Democrat* provides thematic building blocks for the third way: Start phasing out mandatory group preferences; wherever practical, target affirmative action by need, not by race alone; shift efforts to combat inequality from the courts and federal bureaucracies to the economic arena; don't lower standards

but lift people up to common standards instead; don't bestow group entitlements, but instead use public resources to build individual capacity.

Finally, as author Jim Sleeper argues, our political leaders should have more faith in civil society.²² Rather than base affirmative action on the insulting premise that government must perpetually compel citizens to do the right thing, it's time to acknowledge incomplete yet incontrovertible progress and move on to the next phase of the struggle for racial justice. And instead of waving the bloody shirt of racism to suppress dissent, it's time now to air public doubts and trust in the power of democratic deliberation to move us closer to common ground.

²²Sleeper, Jim. "Leap of Faith." *The New Democrat*, May/June, 1995, p. 23.

Mr. CANADY. Thank you, Mr. Marshall. Again, I want to thank each of the members of this panel for being with us. We appreciate your participation and your testimony.

Mr. COLEMAN——

Mr. COLEMAN. Yes?

Mr. CANADY [continuing]. In your written statement, you say that at its core a large part of the case against affirmative action boils down to the claim that whites are superior and that blacks are inferior. Now you've listened to what Professor Kuklinski had to say about his survey research, and I think that there would be pretty widespread agreement that a significant majority of the American people are opposed to preferential policies, and we get into a little—some differences in the surveys, depending on how the questions are answered, but, clearly—are asked, but when it's—certainly, when it's framed in terms of preferential policies, most Americans would express their support.

Do you really believe that the bulk of that opposition can be explained by racism?

Mr. COLEMAN. Well, if you mean by racism that when a white person looks at the black person, all he wants to do, what Furman wanted to do, to kill him, I would say the answer is no. But if you mean that instinctively when a white person looks at most black people, that the way he or she reacts is not exactly the same as when he or she looks at a fellow white, and to that extent I think, yes, that a lot of it is based upon the fact that we still haven't lived long enough together, and we don't teach our people in such a way, that they realize that race ought to be irrelevant. For example, I hire a lot of good lawyers. I always ask them, who are the two or three great world writers. They all mention Shakespeare; they may mention a French person, but very few mention Pushkin, which my worldwide friends tell me that he ranks first or second. If I then ask them, do you realize Pushkin was a black man, they're shocked, and yet these are the people that go to the great colleges, to law school, and they just don't get taught that.

Second, with respect to these statistics offered by Professor Kuklinski, I'm scared as hell when a guy sits next to me and tells me that he has checked only white people for a decision which is adversely going to affect my people. I'd love to see the questions, I ask you to look at page 30 of my written statement, where you have the California referendum and 81 percent of the people said that they favor the referendum, but, yet, when you read it and you realize that the liberals, the middle class, and the conservatives will all say yes, because this question is completely misleading, and when Harris was able to ask the right question, the results changed completely.

Mr. CANADY. Well, so you don't—let me understand—you don't believe that a majority of the folks in the country, the American people, are opposed to preferences based on race and gender?

Mr. COLEMAN. I don't think that the majority of people in this country are opposed to programs which say, if it depends upon capital—and I realize that for——

Mr. CANADY. I'm sorry, I'm not——

Mr. COLEMAN. No, no, no, no, no, you can't. If you're—look, you're doing things now which are going to affect a great number of people. And, incidentally—

Mr. CANADY. Sir, I don't understand the response.

Mr. COLEMAN [continuing]. You're doing it based on a Supreme Court decision which is 5 to 4, and I'd ask all you constitutional lawyers to show me any case which says that, whatever the Federal Government does, it's governed by the 14th amendment. The cases all say no; it's governed only by the fifth amendment.

And I want you in good conscience to tell me that when the fifth amendment was adopted in 1789, it was meant to outlaw any law based upon race when you had slavery and the three-fifth clause. So we start with the proposition that the—

Mr. CANADY. I'm sorry.

Mr. COLEMAN. No, no, no, but if you asked me—

Mr. CANADY. I need to move on to another question. I think—

Mr. COLEMAN. Well, you can't move on, with all due respect—

Mr. CANADY. With all due respect, we are going to move on.

Mr. COLEMAN. Now wait—can I ask—

Mr. CANADY. I'm sorry, my time has expired.

Mr. COLEMAN. Well, I—well, I'd like to finish—

Mr. CANADY. We'll have a second round, and—

Mr. COLEMAN. No, no.

Mr. CANADY. I'm sorry, you—I asked a very simple question, and I'm trying to—

Mr. COLEMAN. No, but these questions aren't simple.

Mr. CANADY. Mr. Frank is recognized.

Mr. FRANK. Yes, why don't you take the first minute or so of my time and finish your response?

Mr. COLEMAN. First, it's simple. If you say that an opportunity is based upon having capital, and if I know, for example, that when the Federal Housing Administration law was passed that blacks could not get the mortgage where whites could, if I know that when I finished being in the U.S. Air Corps in 1946, I couldn't buy a house in Levittown, Long Island, for \$8,000 when a white could, and that house now costs \$200,000, and I couldn't accumulate the capital, I don't think the American people disagreement that, under those circumstances, that when you look—every time you bid for jobs, that blacks never win; that you have to have some system to permit them to participate. If that's what you mean by preference, I think the majority of Americans are for that. If you mean something else, then I'd have to know what you mean before I could answer your question, sir.

Mr. FRANK. Let me thank you, Mr. Coleman. Let me say, Mr. Chairman, I think this has been a very good panel and all the panelists have been thoughtful.

And I do want to ask Mr. Marshall, because I think he is trying to have a very thoughtful answer—I don't agree with all of it, but I am struck when you said "avoid extremism" because I've given you a copy of the legislation that was introduced by the subcommittee chairman and many other Members. I'd particularly ask you to look at page 7, subparagraph 2, where it defines grant of preference, one of the things that would be outlawed, and it says, "grant a preference"—that is, this is what would be outlawed—

"means use of any preferential treatment and includes, but is not limited to, any use of a quota, set-aside, numerical goal, timetable, or other numerical objective."

The reason I say this, in your written testimony you cite Charles Musko saying that the army has done a very good job, and Colin Powell has, of course, also pointed to the army's affirmative action program as a good system; we've invited General Powell to come and testify, but our schedules don't seem to mesh. I think "not in this century." "Not in this century" appears to be a general answer. [Laughter.]

But one of the things you advocate, it seems to me, is then to say, this model combines goals, but not timetable for education and, presumably, also for the military, where it was used. I assume that means, then, you would not agree with that legislation, that you would not want us to enact legislation that would make it illegal to use a numerical goal, because in the legislation before us a numerical goal is specifically by itself outlawed with or without timetables. You're saying you're for goals without timetables. This legislation would outlaw numerical goals being used by the Federal Government. I'm wondering what you're——

Mr. MARSHALL. Well, what I'm saying, Congressman, is that I think that most of this, the Federal panoply of preference policies, set-asides, the policies that are pursuant to the Executive Order 11246, that requires goals and timetables, ought to be phased over time. I don't favor immediate——

Mr. FRANK. That's not what I'm asking. I'm asking you whether we should specifically ban goals without timetables because that's one of the things that this legislation would do. In our subcommittee this is a bill that's before us. So it seems to me that your testimony would argue against banning the use of numerical goals.

Mr. MARSHALL. I think that the programs that are in place now, most of them——

Mr. FRANK. No. Mr. Marshall, I'm not asking you that. I don't understand why you can't focus—I'm not asking you for comments on all of the programs.

Mr. MARSHALL. I'll just give you my answer, and then you can——

Mr. FRANK. No, but that's not your answer because——

Mr. MARSHALL [continuing]. Determine whether I answered or not.

Mr. FRANK [continuing]. It's not an answer; it's a comment, but a question gets an answer. This bill says it's very straightforward: We should outlaw the use of numerical goals. Your testimony seems to me to indicate that you're for numerical goals in some areas, in military, education, without timetables. My question is, would you want us, then, to pass a law which would outlaw numerical goals?

Mr. MARSHALL. I'm trying to explain that the answer is, yes, I think that most of these Federal preference policies, based on these kinds of goals, ought to be phased out over time.

Mr. FRANK. No, Mr. Marshall, that's not the question. In the first place, some of them are to be phased out, because the Supreme Court has already said they're unconstitutional, but this is legislation that would say you could never use a numerical goal. Are you

in favor of legislation that says we could never use a numerical goal? Your testimony seems to me to indicate the opposite.

Mr. MARSHALL. Well, you're asking me to speculate about policies that may——

Mr. FRANK. No, no, please, that's just unfair. I'm not asking you to speculate about anything; you're here to testify. This is legislation, and it says specifically you may never use in the Federal Government a numerical goal. We're not talking about past policies; we're talking about laws for the future as well, and your testimony says use numerical goals.

Mr. MARSHALL. Well, Congressman, I'll look carefully at this, which I haven't looked carefully at before, but I'm only—I'm telling you my position, which is not here to testify in favor of this bill, but to testify in favor of phasing out the existing on-the-books preference policies, what I think——

Mr. FRANK. I'm disappointed, Mr. Marshall, because you say that you're here to have us do fresh thinking, and, frankly, that does not seem to me totally candid. There are tough choices, and it's easy to, I think, dance around them, and I worry you're doing that.

Mr. CANADY. The gentleman's time has expired. Mr.——

Mr. FRANK. Mr. Chairman, could I just ask you, if we're putting statements in the record, I have one from our colleague, Ms. Jackson Lee, that I'd like to put in the record.

Mr. CANADY. Without objection, it will be entered into the record.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF TEXAS

I am pleased to submit this written statement to the House Judiciary Subcommittee on the Constitution on the subject of the Economic and Social Impact of Race and Gender Preference Programs. First and foremost, I would like to say that the term "racial and gender preferences" is pejorative and suggests or infers that certain groups are being advantaged and other groups are being disadvantaged. Those individuals who use such terms as "racial and gender preferences" would prefer to ignore this nation's legacy of slavery and segregation as well as the barriers to advancement for women and minorities that remain pervasive. There are bills pending before the Congress that are really attempting to end affirmative action, a policy that has been good for America and a policy that many Americans support.

Affirmative action is an effort by the federal government to remedy past and present discrimination by establishing flexible goals and timetables to provide opportunities to those who have been subject to discrimination. Affirmative action does not mean

quotas. Most federal programs involve outreach programs and goals and timetables. The outreach programs serve to encourage applicants who do not belong to the "old boys" network. The goals and timetables are drafted by the companies themselves and there is no enforcement penalty for companies which do not meet the goals as outlined. Furthermore, the plans are based on qualified workers and consider the number of qualified workers in the local labor market.

Affirmative action has resulted in economic and social benefits for America. A recent survey of CEOs completed by the Organization Resources Counselors found that 94% of CEOs stated that affirmative action helped to improve their ability to find qualified applicants in initial hiring. In a recent survey of cities' use of affirmative action conducted by the U.S. Conference of Mayors, 89% of the respondents stated that affirmative action aided in identifying relevant qualifications for jobs, 88% reported improved outreach and recruitment and 52% reported a better public perception of the quality of services provided.

In education, diversity brings a greater range of perspectives to the classroom, and improves the learning process for everyone by including people from different social, cultural and racial backgrounds. Affirmative action does not stigmatize its beneficiaries, who still must meet the same graduation requirements as other students. Instead, affirmative action has

helped to increase the number of African Americans, Latinos and other minorities attending colleges and universities.

We live in a multicultural, multiracial society. The most productive economy is one that includes everyone. A system that prevents people from competing at all levels, either because of misperceptions or discrimination, reduces the efficiency of the national economy.

The implementation of antidiscrimination and affirmative action law has increased the proportion of minorities and women employed in the private and government sectors. According to the EEOC, from 1966 to 1993, the proportion of minorities in the private sector increased from 11.4% to 23.5%. From 1972 to 1992, the proportion of minorities employed in the federal government rose from 19.7% to 29%.

Our nation, however, is still a long way from truly equal opportunity. The Glass Ceiling Commission found that white males continue to hold 97% of senior management positions in Fortune 1000 and Fortune 500 service industries. Moreover, black unemployment is more than twice that of white unemployment, and black median income is still only 70% of white median income. People of color continue to experience higher levels of poverty. The overall poverty rate for African Americans is 33% and 29% for Hispanics, while the poverty rate is 11% for whites. While the poverty rate for white children is 14%, over 50% of African

American children and 44% of Hispanic children live under the poverty level.

In 1990 African Americans accounted for 12.1% of the population, but African Americans owned only 3.1% of the total businesses and 1% of receipts of all U.S. firms. Hispanic Americans accounted for 9% of the population, 3.1% of U.S. businesses and 1.2% of all receipts. In 1987, according to a U.S. Department of Commerce survey of minority businesses, 93% of minority-owned firms were individual proprietorships, 80% had no paid employees, and 79% had gross receipts under \$50,000 per year. While this record has improved since 1987, this is not the time to retreat on ensuring that minority-owned firms reach parity, in terms of their population, in receiving government contracts. The Glass Ceiling Commission also reported that Asian and Pacific Islander Americans earn less than whites in comparable circumstances when all other circumstances, including occupation, English fluency, age, and education are controlled for. In addition, across the broad range of occupations, an earnings gap persists between women and men. In 1993, women still earned, on average, only 71.5 cents for every dollar earned by men.

Currently, there are policy proposals to replace affirmative action programs with class-based policies. Class-based policies, however, do nothing to rectify the disparities that are linked to past and present discrimination. The color-blind approach was tried after 1964 and was not sufficient to break down the effects

of ingrained discriminatory practices, informal networks, and other barriers that stand as obstacles to equal opportunity.

The economic and social impact of affirmative action has been beneficial to America as a whole. The claims of widespread reverse discrimination are simply not reflected in EEOC and court records. Between 1987 and 1994, complaints of reverse discrimination by white men represented 2% of total discrimination complaints.

Our nation's people are our greatest resource and our greatest source of strength. In order to remain competitive in a global economy, we need to make a conscious effort to utilize the skills of workers from all segments of our multicultural society. A USA TODAY/ CNN/ Gallup poll found that 54% of Americans think that affirmative action has been good for America, and 57% believe that affirmative action programs should be increased or kept the same. Fewer than one in four Americans believe that affirmative action laws should be eliminated. Political rhetoric and misperception are dividing our country and should not be allowed to dominate this debate. The right of antidiscrimination law requires the remedy of affirmative action to foster tolerance and meaningful equal opportunity.

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. I'd like to thank the panel for coming today, and Mr. Chairman, I'd like to ask unanimous consent to place a statement in the record. And I have no questions for this panel, as fine as they are, and I appreciate your being here today.

Mr. CANADY. Without objection.

Mr. Watt.

Mr. WATT. Mr. Chairman, I think I'll also resist the temptation to ask questions. Thank you.

Mr. CANADY. Mr. Goodlatte.

Mr. GOODLATTE. We're moving fast here. I will take a few minutes.

Mr. Marshall, I admire your efforts to elevate this important debate above the level of narrow partisan politics. Knowing that some prominent members of the Democratic Party disagree with your position on moving away from racial and gender preferences, could you give us your sense of where rank-and-file members of the Democratic Party are on this issue? Can Republicans who want to move from preferences to empowerment, hope to reach across the aisle and find allies in your party? And do you believe that you have identified a policy that can provide some common ground where members of both parties can come together?

Mr. MARSHALL. Well, I guess that I—you'd have better insights as to the first part of your question, talking to your Democratic colleagues, as to whether there's willingness here to strike that kind of bargain.

Mr. GOODLATTE. I mean everybody in general.

Mr. MARSHALL. Well, all I'm—I can only speak for myself, and I think the other—some leading Democrats, Senator Joe Lieberman, in general endorse this approach; that there is a disposition to look beyond preferences and to see whether we can move beyond this highly divisive debate over them and back to what I regard as the common ground in this debate, where liberals and conservatives, Democrats and Republicans can come together, and that's on the question of equal opportunity, as I have said. The Speaker has sounded that theme; other leading Republicans; Jack Kemp, Bill Bennett have sounded that theme. And, yet, you know, the context in which that rhetoric falls is one of fairly comprehensive reductions in social programs, low-income spending, at the same time other programs are being spared.

So there's a lot of mistrust there, obviously, but I don't know any other way out of the quagmire of preferences than to try to move the debate in this direction. I do not believe, personally—I mean, I cannot support the continuation of policies that I think run counter to my principles, the principles that I think provide the framework for expanding freedom and, ultimately, the protection for equal rights and civil liberties in this country. So that's why I think we should move beyond preferential treatment, but, again, there's much skepticism on the Democratic side, and that's why I stressed repeatedly in my testimony the need for some earnest good faith from the Republican side as to whether there's any serious commitment to a new urban agenda, a new agenda of economic uplift aimed at the minority poor in our cities.

Mr. GOODLATTE. Mr. Coleman, I heard at the beginning of your statement your observation about Mr. Kuklinski's polling information, and I must say that I agree that there is certainly still racism extant in this country, and I think we should look for ways to combat that, to cure it, and work to get ahead of it, and I think we have made a lot of progress, but I think we still have a ways to go.

My concerns about preferences and quotas are that in the end it seems to me that it comes down to a decision between two individuals. Whether it be admission to school, whether it be employment, whether it be the issuance of a contract, it is the choice between an individual who, but for taking race into account, might qualify for a position and someone who might benefit by taking race into account for the purpose of attempting to combat bastions of racism.

When you get to that point, it seems to me that you are creating a situation that may attempt to redress a past wrong by imposing a current or future wrong on somebody who is not a party to or participating in that, somebody who might be a young person applying for a job in a police department or a fire department or applying for admission to school, and finding that they are going to effectively be discriminated against on the basis of their race or their gender. And I wonder if you would comment on that, which to me comes to the crux of the whole issue, not of affirmative action, which I favor, if affirmative action means making sure that each one of us who have our own circle of contacts and knowledge, and so on, and it is not as broad as this country or the community is. It seems to me that we need to reach out to people—can I have an additional minute or are you—

Mr. CANADY. Is there objection?

Mr. GOODLATTE. Go ahead and answer as far as I got there.

Mr. CANADY. The gentleman will have 1 additional minute.

Mr. GOODLATTE. Go ahead and answer that.

Mr. COLEMAN. It's an awfully good question, sir—

Mr. GOODLATTE. What I say by affirmative action is reaching out and making sure that your pool of applicants does include everybody.

Mr. COLEMAN. We can put to one side the whole issue of quotas. There is nobody, whether it's the court, the Legal Defense Fund, any other organization, which is in favor of quotas.

Mr. GOODLATTE. Then you would favor the change of some of the current laws that are on the books?

Mr. COLEMAN. I, frankly—I haven't read all the current laws, but those that I've read, the answer is no, because none of them call for quotas.

Mr. GOODLATTE. Preferences?

Mr. COLEMAN. They don't call for preferences. What they say is that you've got to go out of your way to make sure that you have fairly gotten together your group of people.

Mr. GOODLATTE. What about a law that requires that 10 percent of contracts be given to someone based upon—to a group based upon race or gender or—

Mr. COLEMAN. Well, that's not what the—the law in *Adarand*, which I read, that's not what it says. The law in—

Mr. GOODLATTE. Well, I agree with *Adarand* but—

Mr. COLEMAN. No, but the law there didn't say that. The law said that if you won the bid——

Mr. CANADY. I'm sorry, the gentleman's time has expired.

Mr. GOODLATTE. Thank you.

Mr. CANADY. Mr. Serrano.

Mr. COLEMAN. I'd like to come over to your office and see you. Can I come to see you——

Mr. GOODLATTE. I'd love to meet with you.

Mr. SERRANO. Mr. Chairman, I'd like to yield my time to Mr. Frank.

Mr. FRANK. I thank the gentleman.

Let me say, first, to Mr. Kuklinski, because I thought Mr. Coleman's point was, obviously, a fairly strong one—is he accurate in his response, which is that your statistics show that there is still a significant minority among whites who feel racial hostility? Is that an accurate estimate by him of what you said?

Mr. KUKLINSKI. I think that's correct.

Mr. FRANK. Well, then I want to ask all the panelists, people have said, well, we don't need affirmative action, including—and I think this is very significant because we're not talking now just about quotas; we are talking about outlawing numerical goals even, and I think that's a serious flawed approach.

Given that there is a significant percentage of people—fortunately, a minority, and we hope it's a decreasing minority—of people who have that hostility—do you believe that we can rely on antidiscrimination action alone, proving bias in an individual case to get rid of it? And in doing that—let me ask you a question; Mr. Coleman will have some experience with this and Mr. Marshall. Should we rule out the use of statistics in trying to prove that case, because I think that becomes a relevant factor?

If an employer has no or negligible representatives of a particular minority, is that a reasonable factor to take into account? Mr. Kuklinski.

Mr. KUKLINSKI. To take into account to——

Mr. FRANK. In deciding whether or not you're going to have to penalize that employer or whether or not there is, in fact, discrimination.

Mr. KUKLINSKI. Actually, you're really getting into questions of policy, which are not my expertise.

Mr. FRANK. OK.

Mr. KUKLINSKI. I would not pretend to say they are.

Mr. FRANK. Mr. Coleman.

Mr. COLEMAN. All right, I think that the issue is whether, when there's opportunity, do all people get an equal chance for the job or is there something in the system which, more likely than that, would adversely affect blacks and women? To the extent it does, then you have to look at statistics and other things to make sure. Always in the end, I will not have quotas and I will not hire people that don't have the merit.

Mr. FRANK. Let me ask—Mr. Marshall, you talked—you said with regard to education, you would allow race to be a factor. What would that mean? And you said you would follow—use goals. How would that work with regard to—and I assume that would include

public colleges as well as private. How would that work? I mean, you would give some preference based on race?

Mr. MARSHALL. Yes, Congressman, I think that we should continue, basically, with the framework set out in the *Bakke* decision, which says that race can be a factor in admissions. I think that there are changes necessary in the way we do it. I think we ought to add a class as well as needs test, so that we are targeting affirmative action in college to people who are truly needy. And I further think that we ought to look hard at practices in college admissions that result in a lowering of standards, rather than efforts to lift everybody to the standard they need to be successful in that institution.

Mr. FRANK. But with an economic screen, you would give some preference for drastically underrepresented racial minorities?

Mr. MARSHALL. Yes, I'd continue affirmative action in college admissions. Again, I tend to think of all these remedies as being temporary, but in this case it seems to me that we have a long way to go before—

Mr. FRANK. I think that's very important. Again, I would think legislatively we couldn't do that in this case.

Let me say at this point, because there was some reference to that famous CRS overview, and I want to say one thing, Mr. Marshall. You mention it as 160 programs. I would urge you to read it again.

I would ask unanimous consent to put into the record at this point the Justice Department analysis of that. For instance, 32 percent of them are simply—or 34 percent—outreach to minority-owned. In fact, there are very few of 160 numerically that are quotas or even firm numerical goals. People could still impose them, but the number of such programs is vastly overstated, and I would like to put that into the record.

Let me ask you, finally, Mr. Marshall, you refer approvingly to the military model, and Colin Powell has also done that. I wonder if you could just describe your view of that, if I could have 30 seconds for you just to—

Mr. CANADY. Without objection, the gentleman will have one additional minute.

Mr. MARSHALL. Yes; I'm not an expert on this, but Charlie Moscow is a friend and Gladimere is, and as I understand it, the effort here is to ensure that the recruiting pool has sufficient members of all groups, so that the military can meet promotion goals.

Mr. FRANK. And it has numerical goals for promotion?

Mr. MARSHALL. It has numerical goals; it doesn't have time tables.

Mr. FRANK. And, presumably, the military judges itself based on whether or not it's meeting its numerical goals?

Mr. MARSHALL. They do, but, as I understand it—you know, again, the point for promotion boards is to make good faith efforts to meet these targets, but that if they find that, despite their best efforts to expand the applicant pool, that they are not able to do that, nobody is punished—

Mr. FRANK. Right, but it would mean that, everything else being roughly equal, you might be better off to be a member of a racial minority than not in getting a promotion?

Mr. MARSHALL. Well——

Mr. FRANK. If they hadn't met the goal yet?

Mr. MARSHALL. It—yes. I mean, it is—it's an effort to outreach, to reach out and bring more people, qualified applicants, into the pool.

Mr. FRANK. So the answer would be yes?

Mr. MARSHALL. Yes.

Mr. CANADY. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman, and good morning to the panel. It's good to see Bill Coleman here, as usual.

You know, when I came to the Congress, we couldn't even have discussions like this because there wasn't anything to discuss. I mean, the segregationists were largely in control. We looked to the courts for relief, and now, of course, that is diminishing fast.

In the city of Detroit, former Mayor Coleman Young spent tens of millions of dollars going through the courts on affirmative action programs to merely bring some repair into the system of obvious racial discrimination in city units of government. We went up and down through the courts; it was incredible what happened.

And now we have come to a point where we're discussing the question of affirmative action, but it's the backdrop to a bill offered by our subcommittee chair which is titled:

To prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal employment, contracts and programs, and for other purposes.

This could be a very important contribution except that in looking over the cosponsors, I notice that they're pretty conservative ladies and gentlemen of the Congress who have never said—had many positive comments about affirmative action. And so we're moving into a situation where we've got to talk about this, and I think your opening presentation, Mr. Coleman, was really outstanding because it compressed your lengthy and interestingly submitted statement into a short, understandable form.

What do you think, Bill, has caused this resurgence in the literature and in the media and in the minds of a lot of people that now this once bipartisan, accepted tool of affirmative action is now undergoing rather strict and constricting review and challenge?

Mr. COLEMAN. Well, as I try to say in my statement, I think that part of it is based upon misleading information given by the press, and, unfortunately, by some public officials trying for higher office. One, I don't think that there's the general rejection of these concepts that some of the statements would lead you to believe.

Second, when we had the downturn in 1990 recession and somebody lost his job, they said it was because of affirmative action, because they hired blacks or hired women, which just isn't true, because in any downturn, the guys that lose the jobs first are the blacks because they were the last hired.

Thirdly, the fact is that there's always been in this country a deep feeling directed against blacks. It would have to be. Slavery, *Plessy v. Ferguson*, *Dred Scott*, Compromise of 1877, the fact that repeatedly that's been it. After all, we fought two world wars for freedom. In each one the forces were segregated. The urban communities, you know, just look at it, and I don't think we should feel ill of the American people; we just have to face up to the facts of

life, and the fact is that a black who comes out well trained does not have the same opportunity as a comparable white person. I mean, I set forth my biographical sketch not as a matter of ego, and I had a teasing sentence there where I said the number of times I got affirmative action that helped me would be amazing. I'd hope like heck somebody would ask me what they were, but they haven't. So I'll just pass, but someday I'd like to come over and just tell you how a person who finished first in his class at the Harvard Law School, clerked for Felix Frankfurter, still in the city of Philadelphia in 1949 could not get a job.

Mr. CONYERS. Could I get an additional minute, Mr. Chairman?

Mr. CANADY. Without objection, the gentleman from Michigan will have an additional minute.

Mr. CONYERS. Thank you.

You know, you remind me of the late Wade H. McCree of Detroit—

Mr. COLEMAN. Yes.

Mr. CONYERS [continuing]. Of whom you knew—

Mr. COLEMAN. He was a classmate of mine.

Mr. CONYERS. Yes. Wade—they had—we had to form a new school. There were no preschools in the city of Detroit or surrounding areas that would accept his children in school, and we had to form one. Wade became an administrative judge and then a State judge and a Federal judge, solicitor general, et cetera. As a result of not being accepted in any law firm in the city of Detroit, he was literally forced into Federal Government. And I'm reminded, of course, that Colin Powell is himself the product of affirmative action from the Secretary of the Army, who made it very clear that they were not going to continue promoting generals unless some blacks were also promoted.

So, as I—

Mr. CANADY. I'm sorry, I think the gentleman's additional time has expired. Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

I wonder if anyone on the panel would like to tell me whether affirmative programs—well, let me change that to set-aside programs specifically—whether set-aside programs benefit all economic groups within a racial classification or whether they disproportionately benefit those that are well to do within a racial classification; in other words, people that are connected and in a position to know that a set-aside program exists, and they somehow avail themselves of that opportunity.

Mr. COLEMAN. Well, actually, when you're—the way you all do the statute is quite well. What the statute said is that if you're in a certain group, there's a presumption—and certainly the administrator can go against that presumption. Now sometimes they do and sometimes they don't, but if in this country we're going to say that it's wrong and illegal that those who know and have access, that somehow that's bad, then I think all of us better go home and be unemployed, because I think almost everybody here got where they are in part because they had access which other people didn't know about.

Mr. INGLIS. Well, let me ask you a little bit more precisely. Does anybody know of any studies on this question of whether the eco-

nomically advantaged are those that are most advantaged by set-aside programs, in that they are in a position or have connections enough to use that system effectively? Is there any research on that?

Mr. COLEMAN. My understanding is that you will find, when you do the studies, that some people who were poor, and but for the program would never have gotten the advantage. Like any other Federal program that you've ever done here, there are always some chiselers, and you may have instances where, you know, wives front for their husbands or you may have another situation now in the one that may be coming to your mind to prompt your question is the FCC. The trouble there is that Congress drew the statute in such a way, the guy that really benefits is not the black, but it's the white seller, and he's the one that gets all the tax benefits, and so there you would find that.

Now, on the other hand, if you are saying that there are some blacks and some women who are now much better off because of these programs, the answer is yes, and we hope that those people, like you, will use that opportunity to reach out to other people and bring them in.

Mr. INGLIS. Let me ask you, then, on that point, how long should that person be advantaged by a set-aside program, someone who has overcome any economic adversity and is now at the top of the heap? How long should they be advantaged by a set-aside program?

Mr. COLEMAN. Well, the statute sets that out, sir. The statute says that when a participant reaches a certain economic situation, he or she has to get out of the program. The only—

Mr. INGLIS. I'm not aware of that. I'm—you're talking about the FCC situation?

Mr. COLEMAN. No, I'm talking about—I'm back now talking about the general set-aside programs that you are talking about, the—

Mr. INGLIS. I'm not aware of a means test. Is that—

Mr. COLEMAN. Oh, yes, the statute says that. Now the problem is that somebody may have a contract and they get out halfway finished—they get to the max halfway finished—

Mr. INGLIS. Yes.

Mr. COLEMAN [continuing]. And I think the administration has said you can complete that contract.

Mr. INGLIS. Yes.

Mr. COLEMAN. You can't get new opportunities once you get out of the program and you're no longer qualified because you're now making too much money.

Mr. INGLIS. And the situation where the husband sets up the wife as the owner of the corporation—

Mr. COLEMAN. Well, I'd better check my law firm to see whether I'm representing any of the cases [laughter], but assuming that I'm not, I would say that if it's done improperly, that's as wrong as when you give a tax deduction and somebody files a false statement. Those things are just wrong, but that doesn't mean you should drop the whole program because, like any other program the Congress has ever enacted, there are always 1 or 2 percent of the people that don't follow the law.

Mr. INGLIS. But if I'm a wealthy person and I have got money to invest in a stock company—in other words, a company would

issue me stock—if I find a nice woman or a black male that I want to buy the stock from—

Mr. COLEMAN. Why don't you say "a nice black male?" Why don't you keep it consistent, a nice woman, a nice black male?

Mr. INGLIS. Well, if I find somebody that I can set up in a business, is there any way really to stop that from happening?

Mr. CANADY. The gentleman will have 1 additional minute.

Mr. COLEMAN. Yes, yes, yes. Those are wrong, and the SBA, when they are administered by good people, stop those; they don't permit those.

Mr. INGLIS. Well, how can you stop it? I mean, if I'm—I'm not wealthy, but if I were, and if I had a lot of money to invest, if I find somebody that will own, run the corporation ostensibly and turn me a great profit based on the set-aside that's available, is there anything wrong—

Mr. COLEMAN. Yes.

Mr. INGLIS [continuing]. With my motivation? What is it?

Mr. COLEMAN. There are rules on how much the minority or the woman has to own. I mean, if what you're saying is that if the minority owns 60 percent and some person lends them money and owns the 40 percent, and the business is successful, the person who puts up the 40 percent will profit, but not as much as the person who puts up 60 percent, and that's what the program's supposed to do. I mean, you get the contract; you go to the bank; the bank makes interest, and the bank profits, but the minority or the woman is supposedly the one that gets the maximum amount of the benefit.

Mr. CANADY. The gentleman's time has expired.

Again, I'd like to thank the members of this panel for being with us. We appreciate your testimony.

And I'd like to ask the members of the second panel to take their seats.

On our second panel we will hear from witnesses addressing the economic impact of preference programs. The first witness is Prof. John Lunn, an instructor at Hope College in Holland, MI. Professor Lunn is an economist who has studied issues related to racial discrimination and racial preferences in Government contracting.

Next we will hear from Prof. Jonathan Leonard. Professor Leonard is a professor of economics at the University of California at Berkeley.

Our final witness will be Dr. Farrell Bloch, who heads his own economics consulting firm. Dr. Bloch has studied the effects of affirmative actions on labor markets.

Again, as with the witnesses on our first panel, I would ask that you limit, each of you limit, your remarks to no more than 10 minutes. We will, however, place your entire written statement in the record, without objection.

Professor Lunn.

STATEMENT OF JOHN LUNN, PROFESSOR, DEPARTMENT OF ECONOMICS, HOPE COLLEGE, HOLLAND, MI

Mr. LUNN. Thank you, Mr. Chairman, for the opportunity to speak to you about the economic impact of affirmative action programs. My professional interest in this subject began when I par-

ticipated in a predicate study for the State of Louisiana. When I went into that study, I was somewhat agnostic as to what I thought the effects were of affirmative action programs. In that particular example, set-asides or requirements for a certain proportion of contracting, to go to minority- or women-owned firms was required.

I recognized, obviously, the fact that discrimination has been very widespread in this country down through the centuries; that suddenly making discrimination illegal doesn't mean that all opportunities are now equalized, and so I was very sympathetic on that score. And, yet, on the other hand, I was also—very simply, two wrongs don't necessarily make a right.

But, more importantly, in economics we often focus on the fact that policies sometimes have effects that weren't accounted for, weren't planned on, when they were first passed, and so you have to look at it a little bit more carefully.

As I see it, the goal is a society in which everybody faces equal opportunities to pursue whatever employment or business or personal plans that they wish. The question, then, is whether in an economic sphere anyway, open markets will achieve this goal more readily or whether some sort of policies that give preferences to groups will achieve it more readily. I tend to think that competitive market forces will be more effective in the long run for achieving the goal, rather than preferential policies.

Gary Becker coined the term "taste for discrimination" and described the phenomenon as someone who acts as if he were willing to forfeit income in order to avoid certain transactions, and this approach is, I think, used by many economists in examining questions of discrimination in economic markets.

In a competitive market setting, discrimination imposes costs on the person who is discriminated against, but it also imposes costs on the one who is doing the discriminating. If I'm a prime contractor, for example, and I refuse to use a minority-owned firm, even though that firm comes in with a bid as low or lower than other firms, then I am raising my costs, decreasing the probability that I'm going to get the award that I'm after. The more competitive the situation, the more likely discriminating on my part is going to cost me business.

And while one may be prejudiced, it doesn't necessarily mean—that does not necessarily translate into economic discrimination, if it's going to cost somebody money. In a study we were involved in there was a lot of discussion with both prime contractors and subcontractors, and there's oftentimes no love lost between subcontractors and primes.

One subcontractor made the statement, as far as he could tell, primes didn't care about black or white; the only color they cared about was green. If you could make them money, they were willing to use you; if you couldn't, they didn't want to.

There's also been some reexaminations of some of the Jim Crow era. I make reference to Jennifer Roback's work in my written testimony that suggests, anyway, that the labor laws that developed in many of the Southern States during that era were passed because the political majority didn't like the market outcome. The

market outcome was not generating the extent of discrimination that the political, people with political power, wanted.

A tool that is often used in discrimination analysis is that of a disparity ratio, the idea being that, say, 10 percent of a market is made up of members of a particular minority group, then you would expect 10 percent of the businesses to also be made up of that group and 10 percent of the business going to members of that group.

But I think there's several problems with relying on this fairly simple tool. For one thing, I think it rests on a fallacious assumption, the assumption that all groups, whether racial, ethnic, or gender, would participate equally in all occupations and in all lines of business in the absence of discrimination.

At the very least, this assumption ignores the important roles played by culture, religion, and history. Just as a brief example, I recently had the opportunity to hear the novelist Chaim Potok give a talk in which he was giving background information for his novels, describing what it was like to grow up in the Hasidic community he grew up in—and the constant emphasis that he gave on scholarship and study of the Torah, in the example he was using—it's not hard to see why people who have been raised in this environment have a tendency to end up in positions where they pursue scholarship as adults. It's a cultural force that's going to be influential, and we are not going to end up having equal representation of all groups in every line of business, every occupation that's out there.

Disparity ratios are also a very crude tool in that they often indicate disparity when there is none. This is particularly likely in the case of markets where there is heterogeneity. There are submarkets where perhaps the submarket is really the relevant market that ought to be looked at. In my written testimony I provide a couple of examples by tables 1 and 2 on that, and I will not speak further on that at this point.

But if we look at a situation where—as I said before, we're trying to look at the fact that past discrimination still has effects. Well, I know the fact that there is still discrimination going on, but what I want to focus on is the idea of past discrimination still having effects.

Suppose, to take an example, a contrived example, suppose we have a market where, because of discrimination, there were no minority-owned firms in the market, and then civil rights legislation is passed. The barrier that kept minority-owned firms out has been dropped. Would we expect to see in the next several months, next year even, suddenly representation in the market or in the industry equal to the minority group's representation in the general population? I think we would clearly say that would be very unlikely, but if there were no current discrimination going on, we might expect to see the flow of new firms into the industry showing a representation from the minority group that had been discriminated against in the past, being there. But it will take years of that flow before the stock concept, the stock of firms in the industry, would have that kind of representation in it.

So that we could be looking at a situation where, by focusing on the stock of firms, we infer that there still must be discrimination

going on, if we were looking at the flow of firms going into the industry, would not necessarily show that to be that case. Table 3 in my written example or comments tries to show a little bit that suggestion.

It certainly would be nice to speed up the process. Is this realistic, and in terms of being able to come up with numbers, I think the answer is yes. In terms of coming up with a movement to some sort of a new longrun equilibrium, I'm less confident that is so.

New firms tend to be small. Their size and inexperience imply that they're not qualified for some tasks that larger, more experienced firms are qualified for. But if a program, a preferential program, is inducing, say, prime contractors to use subcontractors, and use subcontractors perhaps for tasks that, in terms of experience, and so forth, they're not quite ready for yet, it seems to me that some negative results can happen. You're increasing the likelihood that the firm is going to have difficulties.

People, as they are, I think then come back and say, "Well, the Government made me do this. I had to hire this group. They're not doing the job." And inferences can be made across all minority-owned firms that are unwarranted.

Second, when any firm, any new firm trying to grow, runs into some very critical times, where the cash-flow problems become important as you're trying to expand, if this is accelerated at too rapid a pace at this point of development, you're increasing the likelihood of business failure, I think, for some firms. So that I'm not convinced that, at least with respect to minority-owned firms and women-owned firms, and the programs that I've looked at in some of the construction industry area, that these programs are going to, in the long run, bring about the goal we're after of equal opportunity for all more quickly than what market competition will.

Perceptions of discrimination are not the same thing as discrimination. In the study we did in Louisiana, we asked firms, or we asked respondents, whether they felt that the system, the contracting system, discriminated against peoples of various groups, and we listed various groups. And it was interesting to note that each group—and the groups were blacks, members of other races, French Acadians, because we're required to by the law that got this study going, and women—each group perceived discrimination against itself more than it perceived discrimination against any other group.

I fear that continued reliance on programs that focus on race, ethnicity, and gender will exacerbate this gap between reality and perception and make it more difficult to achieve a society that provides equal opportunity for all.

Thank you.

[The prepared statement of Mr. Lunn follows:]

PREPARED STATEMENT OF JOHN LUNN, PROFESSOR, DEPARTMENT OF ECONOMICS,
HOPE COLLEGE, HOLLAND, MI

Thank you for the opportunity to speak to you about the economic impact of affirmative-action programs. My professional interest in this subject began when I participated in a predicate study for the State of Louisiana. The Croson decision in 1989 made it necessary for many governmental bodies to sponsor a study, generally statistical in nature, to provide the factual predicate needed to justify the race-conscious program. Professor Huey Perry of Southern University and I were co-principal investigators of the study funded by a grant from the State of Louisiana.¹ Much of what I have to say is drawn from this study. Some of the results of the study were published in the Industrial and Labor Relations Review,² and in an article I wrote for a monograph.³

My training as an economist affects the way I approach questions such as affirmative action. Economic analysis tends to be forward-looking rather than backward-looking. This is seen in our treatment of costs as opportunity costs one faces now rather than as the historical prices one has paid for something. Economic

¹John Lunn and Huey L. Perry, An Analysis of Disparity and Possible Discrimination in the Louisiana Construction Industry and State Procurement System and Its Impact on Minority- and Women-Owned Firms Relative to the Public Works Arena. Final Report for the Governor's Task Force on Disparity in State Procurement (April 1990).

²John Lunn and Huey L. Perry, Justifying Affirmative Action: Highway Construction in Louisiana, 46 Ind. and Labor Relations Rev. 464 (1993).

³John Lunn, Markets, Discrimination, and Affirmative Action: Economic Theory and Evidence, in Racial Preferences in Government Contracting 49 (Roger Clegg ed. 1993).

analysis also relates to finding the efficient means to achieve some goal. As I see it, the goal is to have a society in which all members face equal opportunities to pursue whatever employment, business, or personal plans they wish. Past discrimination limited opportunities of some members of society, in ways which still affect the opportunities of some people today, even in the absence of ongoing discrimination. Given past discrimination and its effects, as well as current discrimination, how can we achieve the goal of equal opportunities for all, independent of race, ethnicity, or gender? If affirmative action programs could ensure that we achieve this goal and do so more quickly, I would endorse wholeheartedly these programs. However, I fear that they will not achieve the goal. Instead, I think that competitive market forces will bring about the goal more quickly than will programs that rely on preferential treatment based on race, ethnicity, or gender.

Markets and Discrimination

It is easy to see that discrimination harms the person discriminated against. What is less obvious is that discrimination also costs the one who discriminates. Gary Becker coined the term, "taste for discrimination," and described the phenomenon as someone who acts, "...as if he were willing to forfeit income in order to avoid certain transactions...."⁴ The discrimination can be due to prejudice or ignorance, and may be affected by the size of the

⁴Gary S. Becker, *The Economics of Discrimination* (2nd ed., 1971), p. 16.

minority group, the geographic proximity of members of the minority group, and idiosyncratic differences in personality, i.e., unexplainable differences in tastes among those who discriminate. Contact with members of the minority group and increased knowledge of the true characteristics of the members of the group could reduce the taste for discrimination, but the spread of knowledge will not eliminate all sources of discrimination.

The economic analysis of discrimination relies on Becker's insight that the taste for discrimination is exhibited as a willingness to forfeit income to avoid transactions that involve members of the minority group. For example, suppose a firm wants to hire 50 workers and faces a pool of workers made up of 100 workers of equal productivity. The 100 workers consist of 20 blacks and 80 whites, and 40 of the whites will work for \$10 an hour and the other 40 whites will work for \$20 an hour. The black workers will work for \$10 an hour. The employer who wants to discriminate and hires 50 white workers has to pay a wage of \$20 an hour. (As long as the workers have the same productivity, once the employer offers a wage of \$20 to attract the workers with the higher wage demands, he has to pay \$20 to the other workers too.) If the employer decided not to discriminate, he could hire 40 white workers and 10 black workers for \$10 an hour. In this case, the cost of discrimination to the employer is \$500 an hour. The employer may choose to not discriminate in order to reduce labor costs, or he may choose to discriminate and willingly pay the extra cost.

To continue the example, suppose a rival wants to hire 20 workers too. If the first firm hired all white workers, the second employer faces a labor pool of 30 whites with a reservation wage of \$20 and 20 blacks with a reservation wage of \$10. She also would prefer a white work force due to a taste for discrimination, but she is not willing to pay as much as the first employer to indulge her taste. It is likely she will hire the 20 blacks at a lower wage and have lower costs of production than the first firm. Certainly she will enhance her competitive position relative to the first firm by hiring the black workers. In fact, if she does hire the black workers, her competitive advantage would force adjustments in the industry that would tend to equalize wages for the white and black workers. The market wage for all workers will be \$20 as long as the demand for labor requires the employment of some workers with the higher reservation wage.

The example illustrates several features of an economist's model of employment and discrimination. First, discrimination costs employers who discriminate. Second, competitive pressure reduces the likelihood that discriminating employers can survive in a market when some employers are willing to hire without discrimination. Third, the taste for discrimination is likely to vary across the population. Consequently, market forces will encourage those with a reduced taste for discrimination to hire workers from the discriminated group.

The above example applied to a situation in which workers have identical skills, but can be adapted to account for productivity

differences among workers. In a competitive market economy, the wages a worker receives depend on the worker's productivity, and differences in productivity generate differences in wages. If one identifiable group of workers is more productive on average than another identifiable group of workers, then wage rates will reflect these productivity differences. As long as the differences in wages reflect only the differences in productivity, there is no economic discrimination involved. Suppose white workers are ten percent more productive than black workers, perhaps because of better educational backgrounds. Further, let white workers receive fifteen percent more in wages. Then the owners of a firm that had no taste for discrimination, or a taste for discrimination less than average, would be willing to hire black workers because of the cost savings that can be achieved by doing so. Again, profits can be enhanced by not indulging in one's taste for discrimination.

Similar analysis can be applied to discrimination against firms owned by minorities or women. As in employment discrimination, firms or consumers that discriminate against a firm because of the race of the owner will bear a cost. This cost may be in terms of higher prices or higher search costs. The latter would occur when a customer found a low-cost, minority-owned firm but decided to keep looking for a white-owned firm instead. Further, just as employers are interested in productive workers, customers look for efficient producers, firms look for reliable and efficient suppliers, and prime construction contractors look for productive subcontractors. Competitive pressure tends to weaken

discrimination against minority-owned firms. For example, if existing prime contractors discriminate against minority subcontractors by selecting white subcontractors who are charging higher prices, then savvy entrepreneurs can enter the market, use the cheaper minority subcontractors, and capture business from the contractors who are practicing discrimination.

The existence of uncertainty and imperfect information also affects the market outcome. It is not possible to know the productivity of a worker by observing the worker in an interview, or to know whether a firm will fulfill its contractual obligations satisfactorily by walking into the reception area. People often engage in some search activity in order to learn about prices and which suppliers are more or less reliable. People also can be expected to try to economize on these search costs. Repeat buying is one way customers reduce search costs--once a reliable supplier is found they continue to use that supplier. Obviously, this is not feasible for goods or services that are rarely bought, e.g., an addition to a home. But firms that purchase intermediate products from other firms are likely to rely a great deal on suppliers that have proved reliable in the past. It is not worthwhile to engage in additional search costs once the identity of a reasonably-priced, reliable supplier is found. Of course, this type of activity will make it more difficult for new suppliers to break into a market.

This brief review of economic analysis of discrimination suggests that market forces tend to attenuate the economic effects

of racial prejudice. I am not arguing that no discrimination occurs in competitive markets, but am arguing that economic agents are forced to bear the costs of their discriminatory actions in the marketplace. Competition encourages economic agents to economize, and one way to economize is to cease costly discrimination. Lest you think that such arguments have little force in real-world markets, there is a growing literature documenting the effects of market forces in the post-Reconstruction South. Jennifer Roback⁵ has shown that labor laws developed in southern states in the Jim Crow era were passed because the political majority did not like the outcome of market decisions. In particular, competitive pressure in labor markets did not generate economic exploitation of blacks, so legal resources were used. Roback concluded, "...the evidence indicates that the law, not the market, was the chief oppressor of blacks in the Jim Crow period."⁶ Roback also found that segregation of streetcars was fought by the streetcar companies.⁷ Robert Higgs found that competitive pressure in southern labor markets tended to equalize payments for equal work.⁸ Substantial evidence also exists that shows economic progress by

⁵Jennifer Roback, *Souther Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. of Chicago L. R. 1161 (1984).

⁶*Id.* at 1192.

⁷Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 *The J. of Econ. Hist.*, 893 (1986).

⁸Robert Higgs, *Firm-Specific Evidence on Racial Wage Differentials and Workforce Segregation*, 67 *Amer. Econ. Rev.* 236 (1977).

blacks prior to the passage of the Civil Rights Act of 1964. Both economic theory and considerable empirical evidence support the idea that competitive pressure attenuates the economic effects of discrimination.

The evidence concerning the Jim Crow era in the American South is also consistent with a concern of economists that government regulation of activities often aids politically influential interest groups. Disenfranchised blacks in the South were unable to influence the political process, which was then used by whites to discriminate against blacks when the market process failed to do so. Blacks are no longer disenfranchised, and in some communities make up an important bloc of voters. The stated goal of most affirmative action programs of state or local government bodies is to provide a remedy for discrimination against minorities. Examination of hearings undertaken by the government bodies provides evidence that interest-group politics often are at work. In Louisiana, for example, the legislation that provided for a predicate study concerning the state's construction contracting required the inclusion of French-Acadians as a minority group. Beneficiaries of affirmative action programs are often the larger and better situated minority business enterprises (MBE) or women-owned business enterprises (WBE). For example, a recent study for the City of Richmond found that the bulk of city construction

business went to four large MBEs.' In a study of preferential programs in several countries, Thomas Sowell concluded that the programs benefitted members of the protected group at the upper end of the economic ladder, and harmed those at the lower end.¹⁰ Unfortunately, those at the lower end of the economic ladder often have less impact on public policies than those at the upper end.

Disparity Analysis

Numerous affirmative action programs, at all levels of government, have been enacted. Many government construction projects, especially larger projects, utilize a competitive bidding process in which the firm with the lowest bid is selected. When the lowest bid is used, the contract is not let on the basis of race, ethnicity or gender, and is not discriminatory. It is still possible that prime contractors are discriminating against minority subcontractors, but the pressure to submit the lowest bid would encourage the prime contractor to select subcontractors on the basis of low bid. In the study Professor Huey Perry and I conducted for the State of Louisiana, we asked prime contractors for the characteristics they examined when selecting subcontractors. There were no differences between the responses of

⁹National Economic Research Associates, Inc. "Availability and Utilization of Minority Business Enterprises at the City of Richmond, Virginia, Richmond School Board, and Richmond Redevelopment and Housing Authority," (July 18, 1991), p. 75.

¹⁰Thomas Sowell, *Preferential Policies: an International Perspective*, 1990.

white and black prime contractors--both stated that they looked for experience and financial strength, as well as a low bid. That is, they wanted the work done for a relatively low price, but also wanted to be sure the subcontractor had the expertise and wherewithal to complete its portion of the project. One subcontractor stated that prime contractors only cared about one color--the color of money. Prime contractors select subcontractors by determining which subs can make the most money for them.

The study conducted by Professor Perry and me was done in response to the Croson decision.¹¹ This decision by the Supreme Court forced state and local governments to conduct predicate studies in order to have a preferential program for minority-owned firms. When analyzing labor markets, it is widely recognized that the researcher must control for characteristics (such as age, education, and experience) that differ across individuals when trying to determine whether discrimination exists or not. However, most predicate studies ignore important differences among firms when trying to determine whether discrimination exists. Instead, most predicate studies relied on disparity analysis and anecdotal evidence. Neither is sufficient to show that discrimination exists.

Disparity analysis relies on calculating disparity ratios. A disparity ratio is usually defined as the utilization of a group divided by the capacity of the group, or perhaps divided by the

¹¹City of Richmond v. J. A. Croson Co., 57 U.S.L.W. 4132 (January 23, 1989).

proportion of the population made up by members of the group. If ten percent of the construction firms in a geographic region are owned by minorities and these firms receive ten percent of the construction business, the disparity ratio would equal unity, indicating no disparity. If the ratio is less than unity there is a disparity. If the ratio is greater than unity there is also a disparity, but in favor of the group.

Problems with Disparity Analysis

There are several problems with disparity analysis. First, the underlying assumption of disparity analysis is fallacious. This assumption is that all groups, whether racial, ethnic, or gender, would participate equally in all occupations and lines of business in the absence of discrimination. Cultural and religious differences across groups impact the types of businesses people enter. The United States is a nation of immigrants, but the immigrants were not randomly selected from the populations of their homelands. They usually brought the specialized skills associated with the regions of the country from which they came.

Business formation rates vary widely by racial and ethnic groups, and discrimination cannot explain the variation in these rates. A study performed by the Minority Business Development Agency with the U.S. Department of Commerce calculated business

participation rates of the nation's largest ancestry groups.¹² The business participation rate (BPR) is defined as the number of self-employed persons per 1000 population of a group. The national average was 48.9 for 1980. The ancestry groups with the lowest BPRs included those one often thinks of as facing discrimination-- Puerto Ricans, Subsaaharn Africans, and Mexicans, for example. However, other groups that have faced discrimination have rates substantially above the national average--Japanese, Chinese, and Koreans, for example. Cubans are substantially above many other Hispanic groups, and above the regional average for the South. The highest rates are not those from England, Germany or other countries in western Europe, but those from eastern Europe-- Russians and Rumanians. This study also did not control for other variables, such as age. Yet, the groups with the lowest BPRs also tend to have median ages substantially below the national average. The typical 35-year old is much more likely to be self-employed than the typical 18-year old.

A second problem with disparity analysis is that it is a very crude statistical tool. The more heterogeneous the populations, both intragroup and intergroup, the less likely disparity analysis will be reliable. If markets are aggregated together that should be treated separately, then evidence of disparity may be found in the aggregated data even though no disparity would have been found

¹²Frank A. Fratoe and Ronald L. Meeks, Business Participation Rates of the 50 Largest U.S. Ancestry Groups: Preliminary Report (1985).

in the disaggregated data. This possibility is known as Simpson's paradox.¹³ A recent example of the paradox was found with respect to graduate admissions at the University of California at Berkeley. Aggregate data showed a disparity between the percentage of women applicants and the admission rates of women into graduate programs at Berkeley. When the data were broken down by department, the disparity disappeared because of differences in application rates across departments and differences in acceptance rates of all applicants across departments. A similar phenomenon could happen in construction markets if MBEs and nonminority firms differ by important attributes such as size or work classifications. Tables 1 and 2 illustrate two possible situations. In the first table, firms are broken down by size. Minority firms are shown as smaller on average than nonminority firms. In each size classification, minority firms receive their "share" of the market, so the disparity ratio for each size classification exactly equals unity. However, if the industry is aggregated together, the disparity ratio equals 0.496, which many would say is evidence of discrimination. Table 2 provides an example in which the proportion of firms that are minority differ by work classifications. Again, the disparity ratio is unity for each class, but when the two classes are combined, it appears that a

¹³For discussion about and examples of Simpson's Paradox, see P. J. Bickel, F. A. Hammel, and J. W. O'Connell, Sex Bias in Graduate Admissions: Data from Berkeley, 187 Science 398 (1975) and Clifford H. Wagner, Simpson's Paradox in Real Life, 36 The American Statistician 46 (1982).

TABLE 1

Hypothetical Example on Disparity by Capacity

<u>Size Classification of Contractors</u>	<u>Percent Minority</u>	<u>Total County Spending on Construction</u>	<u>Total County Spending With Minorities</u>
\$ 20,000 & Under	18	\$ 100,000	\$ 18,000
\$ 20,001 - \$ 50,000	14	200,000	28,000
\$ 50,001 - \$ 100,000	12	400,000	48,000
\$ 100,001 - \$ 500,000	10	1,000,000	100,000
\$ 500,001 - \$ 1,000,000	6	5,000,000	300,000
Over \$1,000,000	5	<u>10,000,000</u>	<u>500,000</u>
		\$16,700,000	\$ 994,000

Percent to Minority-Owned Firms (Utilization) $\$994,000/\$16,700,000 = 5.95\%$

Percent of Firms that are minority owned (Capacity) $60/500 = 12\%$

$$D = \frac{\text{Utilization}}{\text{Capacity}} = \frac{5.95}{12.00} = 0.496$$

For every classification, $D = 1$.

TABLE 2

Simpson's Paradox--Example

Suppose there are 1000 firms, of which 200 are minority-owned. The firms are in two work classifications as follows:

Class A		
	<u>Firms</u>	<u>Firms Used</u>
Minority	140	7
White	200	10
Total	340	17

Class B		
Minority	60	13
White	600	130
Total	660	143

For Class A firms, 41.18% (140/340) of the available firms are minority-owned, and 41.18% (7/17) of the firms used are minority-owned. Disparity Ratio is unity. ($41.18/41.18 = 1.0$)

For Class B firms, 9.09% (60/660) of the available firms are minority-owned, and 9.09% (13/143) of the firms used are minority-owned. Disparity Ratio is unity. ($9.09/9.09 = 1.0$)

If the classes are aggregated together, 20.0% (200/1000) of the available firms are minority-owned, and 12.5% (20/160) of the firms used are minority-owned. Disparity Ratio equals 0.625 ($12.5/20 = 0.625$).

Further, the Chi-square statistic for the overall disparity ratio is 6.67, which is significant at the .01 level.

disparity against minority-owned firms exists. While the examples used here are contrived, the real world contains many examples of the phenomenon.¹⁴

A third problem with disparity analysis is that it usually fails to account for market dynamics. Suppose a government body initiates a preferential program for minority-owned firms. The preferences encourage existing MBEs to shift their emphasis from other government agencies or the private sector to the agency with the program. The result is an increase in utilization of MBEs in this agency, and a reduction in their availability and utilization elsewhere. Disparity analysis performed on the private sector now would show an increase in disparity, and may be used as evidence for the need of a preferential program for MBEs. The disparity study for the City of Denver did this when it argued that the limited use of MBEs on several projects that didn't have goals was evidence of the need for a race-conscious program. It ignored the heavy utilization of MBEs at the same time by other agencies of the City and County of Denver.¹⁵ The incentives a program creates often distort the market, which makes it inappropriate to draw inferences based on subsets of the relevant market.

¹⁴Two examples are provided in Wagner id.

¹⁵See Harding & Ogborn, et. al. Denver Disparity Study: Final Report (June 22, 1990).

The Distinction Between Stocks and Flows

Disparity analysis usually fails to account for the difference between stocks and flows. The makeup of an industry at a point in time is a stock concept. The rates of entry into the industry and exit from the industry are flow concepts. Suppose there were no MBEs in an industry due to discrimination, and then the formal barriers to entry faced by MBEs are removed due to passage of civil rights legislation. Further, suppose that each year MBEs make up a proportion of entrants equivalent to what would be expected in a world of no discrimination. It will take years before the proportion of firms in the industry (the stock concept) composed of MBEs is equal to the proportion of entrants that are MBEs. Table 3 illustrates with a simple example. There are 100 firms in the industry, and a firm that enters exists for ten years. Initially (Year 0), there are no MBEs, but beginning in Year 1, 20 percent of the new entrants are MBEs. Given the exit rate of 10 percent, it would take ten years before the percent of MBEs in the industry equalled 20 percent. This example could be complicated by allowing firms to exist longer or by having exit rates determined by a probabilistic method. The period of time it would take for MBEs to make up the "correct" proportion of the industry would take longer, but the basic point of the example would be the same.

The example suggests that evidence of a disparity in the stock variable (the industry) may be misleading in determining the kind of market firms currently face. If somehow one knew that 20 percent was the share of the market MBEs would have had in a world

TABLE 3

Year	0	1	2	3	4	5
Firms Existing:						
White		10	10	10	10	10
MBE		0	0	0	0	0
Total		10	10	10	10	10
Firms Entering:						
White		8	8	8	8	8
MBE		2	2	2	2	2
Total		10	10	10	10	10
Percent MBE		20%	20%	20%	20%	20%
Stock of Firms:						
White	100	98	96	94	92	90
MBE	0	2	4	6	8	10
Total	100	100	100	100	100	100
Percent MBE		2%	4%	6%	8%	10%

Year	6	7	8	9	10	11
Firms Existing:						
White	10	10	10	10	10	8
MBE	0	0	0	0	0	2
Total	10	10	10	10	10	10
Firms Entering:						
White	8	8	8	8	8	8
MBE	2	2	2	2	2	2
Total	10	10	10	10	10	10
Percent MBE	20%	20%	20%	20%	20%	20%
Stock in Firms:						
White	88	86	84	82	80	80
MBE	12	14	16	18	20	20
Total	100	100	100	100	100	100
Percent MBE	12%	14%	16%	18%	20%	20%

of no discrimination, it does not imply that immediate failure to achieve 20 percent minority involvement is a sign that discrimination persists. Entry rates provide more information about the current and recent conditions of the market than disparity analysis of the existing stock of firms. Existing discrimination would exhibit itself as a disparity in the rate of entry rather than in the stock of firms. Even without current discriminatory behavior, it could take years before the new long-run equilibrium would be achieved.

Advocates of affirmative-action programs likely would argue differently, though. They would argue that the market process will take too long, and affirmative-action programs are needed to accelerate the process. Further, many would argue that past discrimination still has effects in that many minorities face educational and financial constraints that make it unlikely that the entry rates are free from the effects of discrimination. Again, affirmative-action programs are judged necessary to offset these disadvantages. I believe these arguments fail for several reasons--some of which are economic and others legal.

The Costs of Affirmative Action

The costs of trying to accelerate the movement toward the new long-run equilibrium may be very high. In the example used above, the costs of immediately attempting to have MBEs make up 20 percent of the industry would be enormous. Existing firms would have to be forced out of the industry, or else the industry would have to

expand artificially. In the absence of growing demand, the latter would be ineffectual. Developing business skills and experience takes time. Minority entrepreneurs would not exist in sufficient numbers. An affirmative action program that required the use of minority-owned firms beyond the existing firms' capabilities would lead to an acceleration of minority entrepreneurs entering the affected industries. However, many of these entrepreneurs would not be likely candidates for survival once the government program was over.

The capacity of new firms will always be relatively small, and their inexperience will imply that they are not qualified for many activities that established firms are qualified for. To push too fast could have two negative consequences. First, minority-owned firms that lack experience or capabilities to perform certain tasks but are still given the task, may face many difficulties, leading suppliers, customers, and other firms to conclude that minority-owned firms are, in general, incapable of doing the work. This would negatively affect future prospects of minority-owned firms. Second, many firms fail because of overexpansion and capital-flow difficulties when moving from very small scale to larger scale production. The likelihood of such failures among MBEs is greater if government attempts to accelerate the rate of entry and the rates of growth of MBEs. Affirmative action programs can increase minority participation in the short run, but there are reasons to believe that they will have little impact on the long run unless the programs continue indefinitely.

Stephen Coate and Glenn Loury offer another reason to think affirmative actions programs may not lead to a better long-run solution.¹⁴ They note that discrimination reduces the incentive to invest in skills that relate to employment or business opportunities that are blockaded. But, affirmative-action programs that provide preferential treatment of the groups that formerly faced discrimination may also discourage the incentive to invest in those skills. Coate and Loury show that patronization of the favored group may reduce the incentives to acquire the necessary skills for the tasks under consideration. Without the acquisition of the skills, the favored group will not be able to compete on an equal basis in open markets.

These arguments suggest that affirmative-action programs actually may retard the rate at which economically viable minority-owned firms develop. If this is not recognized, then advocates of these programs will never conclude that the programs are no longer needed. Suppose the arguments above are correct, and affirmative-action programs are eliminated after a number of years of operation. Since some of the MBEs exist because of the preferential treatment and are not economically viable, there will be a reduction in either the number of MBEs or in the amount of business they obtain. This evidence will then be used to demonstrate the continued need for the programs. Just as many

¹⁴See Stephen Coate and Glenn C. Loury, Will Affirmative-Action Policies Eliminate Negative Stereotypes? 83 American Economic Review 1220 (1993).

plants raised in hot houses cannot survive in nature, so some of the firms prospering under a protected environment will struggle when facing open competition. Political pressure to maintain the programs is likely to persist in spite of the failure of the programs to achieve their objectives.

There are also legal arguments against using affirmative-action programs to accelerate the expansion of MBEs. The correlation between those who faced actual discrimination and those who benefit from the program is very low. Such programs benefit firms already in business and people who are thinking about entering into the market. Those who have already entered the market successfully certainly did not face the discrimination others faced in the past. Those harmed by the old practices are not the firms currently in business. But it is these new firms that receive the benefits. Similarly, the people who bear the cost of the remedy are unlikely to have been the actual people who excluded the minority firms in the past. As Justice Stevens noted in an opinion, "Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind."¹⁷

Affirmative action programs might be justified by appeal to general, societal discrimination, which places most minorities at a disadvantage relative to nonminorities in attempting to start a business of any type. But, as argued above, this is likely to be

¹⁷Crosby, at 4145.

ineffective in the long run. Further, the remedy of affirmative action strikes at the symptom of the problem rather than the source. The long-run benefits to society are likely to be greater if the government focused on equalizing general educational opportunities and providing support in the development of technical, business, and financial skills.

Perceptions

There is a difference between the perception of discrimination and the existence of discrimination. In the survey used in the Louisiana study conducted by Professor Perry and me, we included a section of questions about the perceptions of respondents concerning the fairness of the state's contracting system. Those surveyed were asked, for instance, to evaluate the statements: "Companies owned primarily by blacks are discriminated against when competing for construction work on state public works in road, bridge, port, airport, transit, and highway construction in Louisiana." Respondents could say that they strongly agreed, agreed, were neutral, disagreed, or strongly disagreed with the statement. Similar statements were included for women-owned firms, firms owned by French-Acadians, and firms owned by other minorities (Asians, Native Americans, and Hispanics).

Table 4 provides some results from the responses to these questions. The left column lists the ethnicity and gender of the respondents, and the other columns give the percentage of each group that agreed or strongly agreed with the statement. Thus, two

Table 4
Perceptions of Discrimination

Race, Gender, or Ethnicity of Respondent	Perceived Discrimination in the Awarding of Public Construction Projects Against:			
	<i>Blacks</i>	<i>French Acadiens</i>	<i>Other Minorities</i>	<i>Women</i>
White	2.0	2.6	5.1	5.7
French-Acadien	4.8	19.0	4.8	9.6
Other Minorities	28.6	3.6	39.3	14.3
Blacks	78.2	3.2	63.6	40.9
Women	4.0	4.0	18.3	26.0
Men	17.6	4.5	15.9	7.2

percent of the white respondents agreed or strongly agreed that firms owned by blacks were discriminated against when competing for state public works construction jobs. In contrast, seventy-eight percent of the black respondents agreed or strongly agreed with the statement. It is noteworthy that each targeted group had a larger percentage that agreed or strongly agreed that their group faced discrimination than agreed or strongly agreed that any other group faced discrimination. We failed to ask a similar question for white-owned firms, but I am confident that had we asked the question, a larger percentage of white respondents would have agreed that firms owned by whites faced discrimination than would have agreed that any other group faced discrimination. We received numerous written statements from white respondents about reverse discrimination. Obviously, all of the groups cannot be correct. It is also obvious that a sizeable gap exists between reality and perceptions, at least for some of the groups. I fear that continued reliance on programs that focus on race, ethnicity and gender will exacerbate the gap between reality and perceptions, and make it more difficult to achieve a society that provides equal opportunity for all.

Conclusions

Competitive markets tend to reward entrepreneurs who provide goods and services that people want, and do so at relatively low cost. Markets tend to reward workers who are productive. Nonmarket means of rewarding producers or workers are more likely

to base rewards on personal characteristics. In some situations, one might think that this is good. Perhaps markets reward people of great moral character less than a nonmarket system would. However, nonmarket systems also may permit people to indulge in their taste for discrimination without having to bear the cost of their actions. Market forces attenuate the economic effects of racial prejudice by making those who discriminate bear a cost for their behavior. Competition tends to drive out higher-cost producers, which would include businesses that discriminate.

Unfortunately, it is not always obvious that open, competitive markets have these positive effects. As evidence from the Jim Crow era in the South shows, political forces rather than market forces led to the discriminatory behavior of that time period. People are more likely to recognize the positive effects of markets by examining flow figures, such as the rate of entry, rather than in the racial distribution of the stock of firms in an industry. Numerical disparity does not imply the existence of discrimination.

Affirmative-action programs can create the appearance of greater equality of opportunity by artificially increasing utilization of the preferred groups. If these programs discourage people from investing in the formation of the skills needed to run businesses successfully, or increase the probability of poor performance on the part of MBEs, then these programs will fail to achieve the goal of equal opportunity for all. I believe open, competitive markets offer the best hope of achieving a society which provides equal economic opportunities, for all.

Mr. CANADY. Thank you, Professor Lunn. Professor Leonard.

STATEMENT OF JONATHAN LEONARD, PROFESSOR, DEPARTMENT OF ECONOMICS, UNIVERSITY OF CALIFORNIA AT BERKELEY

Mr. LEONARD. Thank you for inviting me. It's an honor to have this opportunity.

As you know, there are really two major criticisms of affirmative action. The first is that it doesn't work, and, therefore, we ought to get rid of it. The second is that it does work; therefore we ought to get rid of it.

Affirmative action, to me, the most interesting thing about it is that the political rhetoric is just out proportion to the actual rather modest impact these programs have had on the ground. To its critics, it's a symbol of liberal access, of ethnic pork barrel at large, with decay. To its proponents, it's a symbol of fairness, of cohesiveness, and the quality. In practice, affirmative action—and here I'm focusing on the employment impacts, particularly under the Department of Labor's contract compliance program—in practice, those facts have been looked at a number of times, not least by congressional committees preceding your own. The congressional committees, by and large, find a flawed process. There have also been a number of impact studies that are unanimous in finding that the program works. It works in the sense of having modest, but statistically significant—leading to improvements in minority employment opportunities. Employment growth rates for minorities are on the order of 1 percent greater per year, during periods where the programs have been on their own scale relatively aggressively enforced.

The program has obviously been more effective where it's had strong political support. It's been more effective in growing companies where there are opportunities. During its early years, its success was I think limited just to blacks and, particularly in entry-level positions. As it matured during the seventies, it led to occupational upgrading for blacks and for other minorities.

The question that—one of the questions that comes up in that context, and it's one I've heard a version of this morning, is, was it just the skilled people who are the connected people who could take advantage of this? And that's also been asserted of the contract compliance program. The evidence we have suggested has been helpful across the board, that it's helped both—people at both ends of the skill distribution, rather than simply acting as a benefit to those who are already the best placed.

The other major criticism that this program has oftentimes been subjected to is the claim that it's just a quota system. The contract compliance program does have a system of goals and time tables. On the one hand, it's accused of being really just a polite euphemism for rigid quotas, and on the other hand, it's been criticized for being worth less than the paper it's written on.

In practice, again, when you look at the progress that firms make toward their goals, what you see under the contract compliance program is that when firms set goals under the contract compliance program, they typically get about a tenth of the way there. I suppose if we enforced steel import quotas the same way, we'd—or

automobile import quotas the same way—we'd be up to our elbows in Isuzus by now. The point simply is that what the regulation requires is a good faith effort, and in this case good faith appears to mean getting about a tenth of the way toward what you promised.

The quota criticism also is raised, concerning not just affirmative action under contract compliance program, but also under the general enforcement of title VII of the Civil Rights Act of 1964. It's interesting to note that, if you take that quota argument seriously, what it implies is that firms in the same industry, hire out of the same labor market, ought to start looking more and more each other in terms of their percent female or percent black or percent hispanic. That's what applying a quota rigidly to firms means. The empirical evidence suggests that that simply hasn't happened; that minorities and women have made progress under these laws and regulations, but these laws and regulations don't appear to have forced quotas on firms as an empirical matter. And, again, I think people who are familiar with the laws, and certainly with the regulations, realize that there's a lot of flexibility built in.

The question before this panel today, I suppose, is, should we get rid of affirmative action? And, normally, when you ask a social scientist that question, they have to speculate, but here we have the advantage; we've already tried this experiment once. It was—this experiment was tried during the Reagan administration. There's a 1987 House Labor Committee report that documents in detail the whittling away of enforcement efforts during the early 1980's. My own studies show that during that same period the advances that minorities had previously enjoyed under the contract compliance program ceased. By the same token, it's worth noting that while the affirmative action program was greatly reduced during that period, the labor market problems that I think really drive a lot of this debate were still with us.

I don't want to leave you with the impression that affirmative action has been the major U.S. policy in this area. I think title VII of the Civil Rights Act has really been the backbone of the Government's efforts here. Title VII has played, I think, a significant role in improving blacks' economic positions and in opening up opportunities for women.

The reason that I think we have affirmative action today and need it is basically that we still have employment discrimination today. The evidence that suggests that is, first, statistical evidence of continuing wage and unemployment disparities between minorities, women, and white males; second, employment audits, such as those carried out by the Urban Institute, that show that when you take testers who are picked to be as similar as they can be made, except for race or sex, white males advance further in those employment situations than do members of minority groups or do women. In fact, I think if this committee, or if this Congress, is serious about fighting discrimination, I think it should consider expanding the use of such employment audits as a way of really fighting employment discrimination.

The third type of evidence of continued discrimination is, of course, the continuing stream of court cases in which the U.S. judiciary finds employers guilty of discrimination under current statute. We do have a serious problem of discrimination in this coun-

try. Andrew Brimmer has estimated its cost on the order of 2 percent gross national product or \$137 billion a year.

We also have other serious labor market issues. We suffer from stagnant wage growth. We suffer from growing inequality. Eliminating affirmative action is not going to touch those serious issues. It will still leave us also with the serious issue of discrimination.

I'm concerned that affirmative action has really become a symbolic lightning rod for a lot of dissatisfaction that probably stems from other ills in the economy, rather—and, in part, also, I think from ignorance about the modest successes that the program has enjoyed both in fighting discrimination and improving opportunities for minorities. The benefits of this program, and affirmative action programs, include fighting discrimination and can lead to improvements for all of us, by removing extraneous factors from employment decisions, by trying to ensure that employment decisions are tied to business necessity, as both title VII, and I believe the contract compliance program does. These programs offer both the prospect of improved fairness and in some cases improved efficiency, and I think that's something that all Americans can embrace.

Thank you.

MR. CANADY. Thank you, Mr. Leonard. You get the award for finishing within your time.

Dr. Bloch.

STATEMENT OF FARRELL BLOCH, ECONOMICS CONSULTANT, FARRELL BLOCH ASSOCIATES

MR. BLOCH. Mr. Chairman and members of the subcommittee, thank you very much for inviting me here today to speak before you about the economic effects of affirmative action employment programs.

Both sides in the current debate seem to accept the premise that affirmative action programs have improved economic prospects for minorities and women. However, my research on employment suggests that affirmative action has not significantly enhanced economic opportunities for the most disadvantaged African-Americans. The beneficiaries of affirmative action employment programs have been some middle-class workers, not the poor.

Misinterpretation of statistics has contributed to, if not created, the impression that these programs are responsible for shifting poor blacks into the middle class. Data collected by the Equal Employment Opportunity Commission, the EEOC, show a marked increase in recent decades in the representation of African-Americans among professionals and managers.

But affirmative action programs affect where these highly trained individuals work, not their skills. In fact, the growth of black professionals and managers is one manifestation of African-Americans' substantial progress in education. In 1960, 20.1 percent of blacks over the age of 25 graduated from high school and 3.1 percent graduated from college. By 1990, these figures had more than tripled, as 66.2 percent of blacks graduated from high school and 11.3 percent of blacks graduated from college.

Now affirmative action plans—and, more generally, the existence or threat of employment discrimination law suits—have placed Af-

frican-Americans into positions in which they were previously underrepresented, even absent. But the black workers, with these new opportunities generally were able to find jobs before. In fact, the most striking change for African-American workers has been their movement from small businesses into larger companies that are more heavily regulated by antidiscrimination programs.

For example, in 1966, less than half of African-Americans in the private sector worked for firms required to submit to the EEOC annual EE0-1 reports with their work force's race, and sex profiles. These reporting firms are evenly split between Federal contractors with affirmative action obligations and noncontractors with at least 100 employees, generally large companies.

By 1980, however, 60 percent of black men and 75 percent of black women in the private sector worked in companies, these large companies, submitting EE0-1 reports, and the oft-publicized EEOC data noted previously, with the movement to and the increase of, black professionals and managers in reporting firms are limited to these large firms, and in part reflect the shift of blacks to large firms.

Now affirmative action, the strongest component of the Federal antidiscrimination effort, similarly has redistributed black employees to large Federal contractors with affirmative action obligations, and these large firms are covered by both the antidiscrimination regulations and affirmative action, and can generally compete successfully for minority and other workers against smaller establishments because large firms generally pay more and have more attractive fringe-benefit programs and more secure positions with less turnover.

Now while many African-Americans were being hired by the Federal Government, by Federal contractors covered by affirmative action, and by other large employers who are subject to the most rigorous title VII scrutiny, the overall unemployment rate for blacks remained twice that of whites for the last three decades, and since 1975 or so, has begun to deteriorate, particularly for young men who did not graduate from high school. Thus, at the same time that some African-Americans enjoyed expanded job opportunities, those with fewer skills fell further behind.

Now the reason affirmative action favors the most skilled blacks is simple. Employers with affirmative action programs, the large Federal contractors under Department of Labor regulation, and other employers who voluntarily adopt affirmative action plans or are required to do because of other regulation or as the result of litigation, naturally, want to hire the best minority workers they can find. Not surprisingly, the best and the brightest are already employed or are fresh out of school and heavily recruited.

At the same time, the threat of employment discrimination lawsuits following termination or failure to promote inhibits employers from taking chances on minority applicants with less impressive credentials. Thus, skilled black workers get better jobs, while unemployed African-Americans with little training and experience are left out in the cold.

African-Americans' gains in the South a generation ago did not result from affirmative action. The significant relative improvement of blacks' employment and pay in the South in the decade fol-

lowing passage of the Civil Rights Act of 1964 resulted from the elimination of Jim Crow. With desegregation, substantial numbers of southern employers could hire available black labor and invoke Federal pressure as a reason for defying longstanding community norms of segregation. Blacks across the economic spectrum benefited.

Gains in the South between 1965 and 1975 contrast sharply with blacks' stagnant or deteriorating situations in other parts of the United States in the last 30 years or in the South itself after 1975. Blacks' lack of progress is especially disappointing given the enormous growth in Federal antidiscrimination law enforcement, including more than a tenfold expansion of the EEOC budget and staff between 1966 and 1980, with slight declines thereafter; establishment of affirmative action requirements for Federal contractors in 1968; in 1971, the *Griggs* case establishing the doctrine of disparate impact, which prescribed tests and other selection criteria that disproportionately reject minorities; and the Equal Employment Opportunity Act of 1972 that broadened title VII of the Civil Rights Act's coverage and expanded the EEOC's powers.

The costs of affirmative action in employment have been little analyzed but may be considerable. The most rigorous study concludes that Federal contractors had expenses 6.5 percent greater than similar noncontractors in 1980. Now with a current Federal contractor payroll in excess of \$600 billion, this 6.5 percent difference is equivalent to Federal contractors' annual affirmative expenditures of \$40 billion.

An open question is the extent to which these costs directly represent regulatory compliance, such as employing additional human resources personnel to execute affirmative action policies, or inefficient hiring and promotion decisions motivated by demographic criteria to achieve an occupational representation of minorities and women that will pass regulatory muster.

Given the cost of affirmative action, and, most important, the negligible benefits to disadvantaged minorities, I hope that Congress will direct its attention to other means of helping poor minorities, some of which are discussed in the Wall Street Journal article attached to my written statement. Foremost among these is encouraging minority entrepreneurship, in particular, by countering the horrific level of crime that discourages business formation in our inner cities. Affirmative action not only does not benefit disadvantaged minorities, but it also draws attention away from policies that might do so.

Thank you.

[The prepared statement of Mr. Bloch follows:]

PREPARED STATEMENT OF FARRELL BLOCH, ECONOMICS CONSULTANT,
FARRELL BLOCH ASSOCIATES

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: I am a labor economist and statistician specializing in the area of employment discrimination. I've been asked to speak before you today about the economic effects of affirmative action employment programs.

Both sides in the current debate seem to accept the premise that affirmative action programs have improved economic prospects for minorities and women. However, my research on employment suggests that affirmative action has not significantly enhanced economic opportunities for the most disadvantaged African Americans. The beneficiaries of affirmative action employment programs have been some middle class workers -- not the poor.

Misinterpretation of statistics has contributed to, if not created, the impression that these programs are responsible for shifting poor blacks into the middle class. Data collected by the Equal Employment Opportunity Commission ("EEOC") show a marked increase in recent decades in the representation of African Americans among professionals and managers. But

affirmative action programs affect where these highly trained individuals work, not their skills. In fact, the growth of black professionals and managers is one manifestation of African Americans' substantial progress in education: In 1960, 20.1 percent of blacks over age 25 graduated from high school and 3.1 percent from college. By 1990, these figures had more than tripled to 66.2 and 11.3 percent.

Affirmative action plans and the existence or threat of employment discrimination lawsuits have placed African Americans into positions in which they were previously underrepresented, even absent. But the black workers with these new opportunities generally were able to find jobs before. The most striking change for African American workers has been their movement from small businesses into larger companies that are more heavily regulated by antidiscrimination programs.

In 1966, less than half of African Americans in the private sector worked for firms required to submit to the EEOC annual EEO-1 reports with their workforces' race and sex profiles. These reporting firms are evenly split between federal contractors with affirmative action obligations and noncontractors with at least 100 employees. By 1980, 60 percent of black men and 75 percent of black women in the private sector worked in companies submitting EEO-1 reports. The oft-publicized

EEOC data noted previously are limited to reporting employers, and in part reflect this shift of blacks to large firms.

Affirmative action, the strongest component of the federal antidiscrimination effort, similarly has redistributed black employees to large federal contractors with affirmative action obligations. During the 1970s, a 10 percent growth in a firm's employment induced an estimated black male employment increase of 12 percent among noncontractors, but 17 percent among contractors. The large firms covered by antidiscrimination regulation and affirmative action generally compete successfully for minority and other workers against smaller establishments that cannot match their pay and fringe benefits.

While many African Americans were being hired by the federal government, federal contractors, and other large employers, the overall unemployment rate for blacks remained twice that of whites for the last three decades, and actually widened in some sectors, notably that for young men who did not graduate from high school. Thus, at the same time some African Americans expanded their job opportunities, those with fewer skills fell further behind.

The reason affirmative action favors the most skilled blacks is simple. Employers with affirmative action programs -- large

federal contractors under Department of Labor regulation, and other employers who voluntarily adopt affirmative action plans or are required to do so because of other regulation or as a result of litigation -- naturally want to hire the best minority workers they can find. Not surprisingly, the best and the brightest are already employed, or are fresh out of school and heavily recruited.

At the same time, the threat of employment discrimination lawsuits following termination or failure to promote inhibits employers from taking chances on minority applicants with less impressive credentials. Thus, skilled black workers get better jobs, while unemployed African Americans with little training and experience are left out in the cold.

African Americans' gains in the South a generation ago did not result from affirmative action. The significant relative improvement of blacks' employment and pay in the South in the decade following passage of the Civil Rights Act of 1964 resulted from the elimination of Jim Crow. With desegregation, substantial numbers of Southern employers could hire available black labor and invoke federal pressure as a reason for defying longstanding community norms. Blacks across the economic spectrum benefited. Gains in the South between 1965 and 1975 contrast sharply with blacks' stagnant or deteriorating

situations in other parts of the United States in the last thirty years or in the South itself after 1975. Blacks' lack of progress is especially disappointing given the enormous growth in federal antidiscrimination law enforcement, including more than a tenfold expansion of EEOC budget and staffing between 1966 and 1980 (with slight declines thereafter), establishment of affirmative action requirements for federal contractors in 1968, the 1971 Griggs case establishing the doctrine of disparate impact proscribing tests and other selection criteria that disproportionately reject minorities, and the Equal Employment Opportunity Act of 1972 that broadened Title VII of the Civil Rights Act's coverage and expanded the EEOC's powers.

The costs of affirmative action have been little analyzed but may be considerable. The most rigorous study concludes that federal contractors had expenses 6.5 percent greater than similar noncontractors in 1980. With a current federal contractor payroll in excess of \$600 billion, this 6.5 percent difference is equivalent to federal contractors' annual affirmative action expenditures of \$40 billion. An open question is the extent to which these costs directly represent regulatory compliance -- such as employing additional human resources personnel to execute affirmative action policies -- or inefficient hiring and promotion decisions motivated by demographic criteria to achieve an occupational representation of

minorities and women that will pass regulatory muster.

Given the costs of affirmative action and the negligible benefits to disadvantaged minorities, I hope that Congress will direct its attention to other means of helping poor minorities, some of which are discussed in my attached March 1, 1995 Wall Street Journal article. Foremost among these is encouraging minority entrepreneurship, in particular by countering the horrific level of crime that discourages business formation in our inner cities. Affirmative action not only does not benefit disadvantaged minorities, but it also draws attention away from policies that might do so.

I would be happy to answer any questions.

Affirmative Action Hasn't Helped Blacks

By FARRELL BLOCH

Both supporters and opponents of affirmative action seem to accept the premise that preferential treatment policies have improved the status of minorities and women. This is necessarily so. The evidence demonstrates, for example, that affirmative action has not significantly enhanced employment prospects for the most disadvantaged African Americans.

The major effect of 30 years of antidiscrimination and affirmative action regulation of the labor market has been to redistribute black workers from small and medium sized firms to large employers and federal contractors—without increasing black employment rates overall.

While black unemployment rates have remained twice those of whites, the proportion of blacks working for firms with 100 or more employees, who must file annual EEO-1 reports to the Equal Employment Opportunity Commission, federal contractors (who are subject to Labor Department affirmative action requirements), and local, state and federal government has grown dramatically. For example, in 1966, black female managers were 40% less likely than white male managers to work in firms with 100 or more employees. But by 1980, black female managers were 50% more likely than their white male counterparts to work in these larger companies.

In the 30 years since passage of the Civil Rights Act of 1964, not only have aggregate black-white unemployment gaps not contracted, they have actually expanded in some markets, notably that for young males with little formal education. Thus, although many African Americans now working in government or for heavily regulated private firms enjoy the pay, fringe-benefit, and job stability advantages of larger employers, most blacks have not gained ground.

Indeed, only in the South in the decade following passage of the Civil Rights Act did blacks' employment and wage rates significantly improve relative to those of comparable whites. This was probably a one-time response to the extreme conditions that prevailed in the South prior to the repeal of Jim Crow and the promulgation of anti-discrimination policies.

The past three decades have witnessed enormous growth in federal antidiscrimination law enforcement, including more than a 10-fold expansion of EEOC budget

and staffing between 1966 and 1980 with slight declines thereafter. Establishment of the Labor Department's Office of Federal Contract Compliance Programs to enforce affirmative action obligations for federal contractors, the Griggs doctrine of disparate impact prohibiting tests and other selection criteria that disproportionately reject minorities, and the Equal Employment Opportunity Act of 1972 that broadened coverage and expanded the EEOC's powers.

How can it be that African Americans' employment prospects have failed to improve despite massive federal intervention designed to benefit them?

Four explanations are likely. First, heavily regulated companies directly involved in or vulnerable to employment discrimination litigation apparently recruit minority employees who would otherwise be available to smaller firms that are either not closely monitored or government agencies or not regulated at all.

Second, to reduce their exposure to litigation, other employers may avoid hiring minority, female, and older workers. Employees are far more likely to file lawsuits than applicants, and judgments for current or former employees tend to exceed those for applicants, particularly in class actions. To avoid hiring people who might litigate on discrimination grounds, companies might locate in areas with few protected minorities—suburbs, certain regions of the U.S., and overseas.

Third, the laws generally cannot help those who do not discover job opportunities made known only through word-of-mouth networks that are still largely ethnically segregated. Because blacks, Hispanics and American Indians have relatively low rates of entrepreneurship, their job recruitment networks are not as fruitful as those of whites and Asian-Americans. The ethnicity of employees tends to reflect that of their employers.

Finally, in deciding which applicants will become serious job candidates, employers favor initial screening criteria that disproportionately exclude minorities. Thus, if companies in the suburbs believe that workers living near their jobs will be less likely to quit, they will summarily reject applicants living far away—therefore disproportionately excluding blacks, Hispanics and others concentrated in cities. Indeed, these employers may recruit via word-of-mouth to attract neighbors of

neary employees, or may place help-wanted ads only in local suburban papers, eschewing the major urban dailies that reach minority job seekers.

Thus, employer recruitment and initial screening practices severely limit the impact of actual or potential government regulation. It is of course possible—but not consistent with the available evidence—that antidiscrimination and affirmative action regulation has had a substantial positive effect on aggregate minority employment but that the effect is not strong enough to compensate for recent trends that tend to drive down minority employment rates: the loss of manufacturing jobs, demand shifts favoring skilled over unskilled labor, growing suburbanization of employment, and increasing drug traffic and crime that discourage business formation in inner cities. In any case, if the U.S. is going to improve employment prospects for African Americans, it doesn't look like affirmative action programs are going to do the trick.

The employment prospects of African Americans will be well served by policies that boost total employment as well as those that enhance opportunities for the low-skilled inner city residents who suffer particularly high rates of unemployment. These include removing minimum wage floors, relaxing occupational licensing requirements, decreasing taxes on low-wage workers or their prospective employers, and countering the horrific level of crime that discourages business formation and job creation in our inner cities.

Private sector charities might also consider job banks that refer disadvantaged workers to occasional short run employment. Short-term jobs not only supplement income, but also provide workers with a second chance to acquire references that will stand them in good stead in the primary labor market.

If the current affirmative action debate extinguishes any remaining delusions that antidiscrimination law is a panacea for minority workers and focuses primary attention on barriers facing poor and minority job seekers, then African Americans and other minorities ultimately will benefit.

Mr. Bloch, an economic and statistical consultant in Washington, D.C. is the author of *Antidiscrimination Law and Minority Employment* (University of Chicago Press, 1994).

Mr. CANADY. Thank you, Dr. Bloch. You get the award also for finishing within your timeframe.

I want to thank the three witnesses on this panel for their testimony.

Professor Lunn, let me ask you this: After the 1989 *Crozen* decision of the Supreme Court, I am told that the percentage of contract dollars spent by Richmond, VA, the governmental entity involved in that case, decreased from around 30 percent to under 5 percent. Now that is for minorities.

Supporters of set-asides point to this as evidence that set-asides are necessary to combat discrimination in the awarding of Government contracts. Let me ask you, first, whether you interpret that decline to be the result of racial discrimination; that is, the decline from 30 to 5 percent, under 5 percent; and, second, if it is not racial discrimination, what other factors might account for the decline?

Mr. LUNN. I don't think the decline by itself is evidence of discrimination. I mean, there may very well be discrimination involved in it; I just don't think that the decline itself is probative of that statement.

Mr. CANADY. Well, what would be the—what would be the other factors that could lead to decline.

Mr. LUNN. If you have a situation where you're trying to accelerate the growth and use of minority business enterprises, and if a number of these firms are there because of the program and do not have much experience as yet, do not have the expertise as yet to compete in an open-market situation, but are there only because of the hothouse environment that's been created for the firms, then if you take away the hothouse, then some fallaway is not unexpected.

Thirty to—what was it, 35 percent, whatever—

Mr. CANADY. Thirty percent to under five percent.

Mr. LUNN. I mean, both elements could be involved there. I'm just saying that it's not conclusive evidence in my view of discrimination, that there are other factors involved.

If you have a set-aside program, it seems to me that if you ever cut—you're always going to be inducing some firms that would be there, but for the program—or would not be there but for the program, and if you eliminate the program, you're always going to see some tailoff in use of the group. But that evidence, if that is taken, then, as evidence that we need the program, I don't think the program will ever be done away with.

Mr. CANADY. OK. Professor Leonard, let me ask you to respond to Dr. Bloch's point about the effect of affirmative action on aggregate employment rates of minorities. If I could simplify Dr. Bloch's testimony, he believes that preferential treatment in the employment context does not create new jobs for minorities, but rather tends to redistribute the available pool of qualified minority workers among different segments of the labor market, the labor force, depending upon the sort of Government regulations to which those different are subjected. Thus, for example, minority workers are concentrated in firms that serve as Government contractors because such firms are often required by the OFCCP and the Department of Labor to grant preferences in their accounting practices.

Do you agree that the primary effect of such programs is to redistribute minority workers from one segment of the work force to another or do you believe that these programs have had the effect of increasing minority employment rates generally?

Mr. LEONARD. Well, first, let me say that, even if all these programs had done purely redistribution, that's not necessarily a bad thing.

Mr. CANADY. OK, but do you believe that that has been the effect? Because I understand there could be some benefits, because people may move from a less secure job to a more secure job, and they may be enhancing their economic well-being; I understand that.

Mr. LEONARD. And we may all be better off by reducing discrimination in this sector.

Mr. CANADY. I understand there may be some benefits, but do you agree with the conclusions that Dr. Bloch reaches on that point?

Mr. LEONARD. I think Dr. Bloch's conclusions come largely from a paper by Finis Welch and Jim Smith, and what that paper documents is a flow from small firms, who are not covered by title VII, into larger firms that are covered by title VII and EEO-1 reporting requirements.

There's also evidence—that's probably the biggest redistribution. Another way to make the same point is to say the unemployment rates for blacks in this country have not improved relative to the unemployment rates for whites. That's pretty close to the same statement, and I think that is a significant social problem that we have to make headway on.

Mr. CANADY. But do you agree that this is an accurate description of what is happening?

Mr. LEONARD. No, I think that's a description of part of what's happening. Part of it has been a redistribution, but I also think that this program has—(a) it's drawn minorities, blacks, and hispanics into contractor firms. It's also title VII largely, is also drawing them into noncontractor firms.

Mr. CANADY. Mr. Frank.

Mr. FRANK. Mr. Bloch, one question on your 6.5 percent difference. You say that given a \$600 billion and payroll, is 6.5 percent higher expenses for them than similar noncontractors? It is a \$40 billion affirmative action expenditure.

I don't see anything in here that says that's all attributable to affirmative action. Are there no other reasons why a Federal contractor might have more costs than a non-Federal contractor, other than affirmative action? I didn't think that was the only thing I heard people complain about.

Mr. BLOCH. That's the most salient difference between them; there may be something else.

Mr. FRANK. Well, OK, but there's a big difference between most salient and 100 percent. Frankly, to attribute the entire cost difference between Federal contractor and Federal noncontractor to comply with affirmative action, it's very unpersuasive to me, and unless you've got some more facts to it, I would urge you to be more careful in the future because I think that's an inappropriate burden to put on affirmative action.

We've got a lot of others. I don't know, is this David Bacon to some extent? Is it a whole lot of others? It's just the very bid requirement—we're sometimes told bidding to the Federal Government is a more—or any government because we are more concerned about corruption, is a more costly process than others.

So you have no reason to, you have no breakdown of how much the 6.5 percent is attributable to affirmative action?

Mr. BLOCH. I have no breakdown about it; I just would say it's a salient difference; that's all.

Mr. FRANK. OK. I would say, based on that, that the \$40 billion clearly excessive. The only question is, by how much?

Mr. Lunn, on your point about discrimination, two things, and I understand this theory that it's not sensible to discriminate, but one of the things that concerns me here is that that approach seems to assume that people are consciously discrimination; that people say, "I am prejudiced and I, therefore, will take the less able person." What about people who discriminate because they have, in fact, internalized the prejudice. I mean, for instance, in the bank area, giving mortgages, I don't think it is today that people consciously say, "I don't like black people. I'm not giving them their mortgage." I think it is that their prejudices lead them somehow to undervalue people. So is there still an economic screen against people who are, in fact, prejudiced or making misjudgments?

Mr. LUNN. I think in the case of something like, say, banking, the question would have to be: is there—are there opportunities for other people to come into the market or other banks in a market to see a profitable opportunity and then—

Mr. FRANK. Banking, of course, is a—banking is a restricted-entry profession, as you know.

Mr. LUNN. Yes, it is. Much of the argument that I've been giving does rely considerably on competitive pressure.

Mr. FRANK. Right. So to the extent that you—there's a problem with the restrictive one—for instance—but even when there's competitive pressure, I mean, what's your sense of—my impression is that the sale of residential real estate was an area of American economic activity that was pretty rife with racial discrimination, and it's also a pretty competitive one. How come? I mean, giving you a theory, how come we had so much discrimination in the sale of residential real estate?

Mr. LUNN. It would have to be that people were either willing to pay the cost or they were too concerned about—

Mr. FRANK. Yes, but would you agree that residential real estate sales have been an area where there's been a significant amount of discrimination?

Mr. LUNN. Yes, I would say there's been discrimination there. I'm not so convinced there's much today or as much today, but I think there was, yes.

Mr. FRANK. Probably because it was on the books, and that's the other point I have. Doesn't your argument really go against not so much affirmative action as against antidiscrimination laws in general? In other words, if competitive pressures will prevent people from discriminating, why do we need the Civil Rights Act? I mean, why—we need—I understand your point about the Roback study, but we need the Federal Government to insist that people be neu-

tral. But we go beyond neutrality; we have laws on the books that say—the Home Mortgage Discrimination Act and Equal Credit Act and the Civil Rights Act—they say to private employers: you may not discriminate. None of these were affirmative action. Doesn't your argument say that we don't need those?

Mr. LUNN. The argument that I've been making would make that argument to some extent, yes.

Mr. FRANK. OK. So you're really not arguing against affirmative action; you're arguing against basic antidiscrimination statutes?

Mr. LUNN. The economic argument I gave was one that argues that competition will tend to attenuate the effects of——

Mr. FRANK. All right, I assume when you say——

Mr. LUNN. I didn't mean to say that it would necessarily eliminate——

Mr. FRANK. I understand that, but, first of all, can you state your formulation, the economic argument that you gave? I assume that was one you believe in, too?

Mr. LUNN. Yes, yes.

Mr. FRANK. I mean, you would just find——

Mr. LUNN. Yes, but there are other things I was trying to look at, too, in my testimony——

Mr. FRANK. I understand that, but I can only ask you about one thing at a time. But I do want to make it clear that, to the extent that the argument is that the market will substantially diminish discrimination, that's not an argument just against affirmative action; it is equally, if not more so, an argument against antidiscrimination laws because antidiscrimination laws aim at doing that.

Mr. LUNN. It would be saying in the long run they're not necessary.

Mr. FRANK. Right, and I guess you'd call to mind that other great economist, John Maynard Keynes, "In the long run we'll all be dead."

Mr. CANADY. Mr. Goodlatte.

Mr. GOODLATTE. I don't have any questions.

Mr. CANADY. Well, I want to thank the members of this panel for being with us. We appreciate your testimony.

The subcommittee is adjourned.

[Whereupon, at 12:31 p.m., the subcommittee adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARINGS

Race and UC Medical School Admissions:
A Study of Applicants and Admissions in the
University of California Medical Schools

Testimony given before the California State
Assembly Judiciary Committee on May 4, 1995

by

Ellen Cook &
Jerry E. Cook

8581 Sugarman Drive, La Jolla, CA 92037
Phone 619-450-1930 FAX 619-453-2821
e_cook@pwa.acusd.edu

Race and UC Medical School Admissions A Study of Applicants and Admissions in the UC Medical Schools

Introduction

The well known author, Thomas Sowell, has written that race is a social construct, not a biological one. In his recent book, *Race and Culture*, he also asserts that equal opportunity does not guarantee equal outcome, simply because different cultures value different ways of behaving (or ways of being), not all of which are rewarded economically. In a country and a state which has people of many cultural backgrounds, it is unlikely that each group will be represented in each profession or in each economic activity in the proportion that it appears in the general population. There is little outcry about the over-representation of Vietnamese working in women's nail salons or the over representation of Cambodians running donut shops, although each implies an under-representation of other groups in these fields. There is an outcry, however, when any particular group is under-represented in those professions which are highly rewarded in terms of status, money or both. Medicine is a profession with an apparent over-representation of white and Asian members and thus an under-representation of other groups.

In an effort to remedy this under-representation, the University of California has undertaken many forms of Affirmative Action for the last 28 years in order to bring four groups into the medical profession — African-Americans, American Indians, Mexican-Americans, and Mainland Puerto Ricans. That there are other minority groups which are also under-represented has been largely ignored. That there are disadvantaged and deserving people of *every* race and ethnicity seeking to become physicians has also been ignored.

Our studies of admissions patterns in UC Medical Schools show beyond a shadow of a doubt that Affirmative Action has overstepped the bounds of outreach. It has gone beyond efforts to prepare these students for a career in medicine and has become a system of racial preference. Certainly Affirmative Action programs to help qualify undergraduates for medical studies and to counsel them early toward activities that will make them attractive candidates are both appropriate and necessary. However, once students have completed four or more years of premedical studies, they should be expected to compete on an equal footing regardless of their racial or ethnic heritage. Outreach programs for undergraduate admissions seem generally appropriate and effective — moreover, 83% of all applicants are accepted somewhere in the UC system. But the sort of racial preference revealed by our

studies has no place in professional education. It goes beyond programs for undergraduate admissions. It goes beyond the 16% quota used in Bakke's day at UC Davis School of Medicine, which the Supreme Court declared unconstitutional.

While the Office of the President of the University of California claims that the admissions practices of the medical schools "should pass legal muster," our studies show that a *de facto* racial preference system is in operation. A preference for one group must always mean discrimination against another.

Because the time is short, I would like to share with you just two examples from our research. The first will illustrate the over-all results of a race-based admission policy and the second will further illustrate that it is clearly race, not disadvantage, that is the determining factor in the admission process.

Applicants from UC San Diego

For the years 1987 through 1993, there were almost 1500 applicants to medical schools from UCSD alone, of which 190 or about 13% were from the four groups considered Affirmative Action. The other applicants were of 14 other races and ethnicity, including, Chinese, Vietnamese, Korean, India/Pakistani, White and so forth.

Figure 1 is a scatter plot of all of those graduates of UCSD who were accepted to the University of California, San Diego Medical School between 1987 and 1993. We felt it was important to compare the results of applications by students who had the same undergraduate background, so this chart is limited to UCSD graduates only. On one axis is plotted cumulative grade point average. This GPA is a composite of the evaluation of about 45 professors over a 4 year period in a variety of subjects, both science and non-science. The vertical axis is an average of the Medical College Admission Test scores which includes biological science, physical science, and verbal reasoning. The pattern seen here is virtually the same for all the UC medical schools. Here are some important observations.

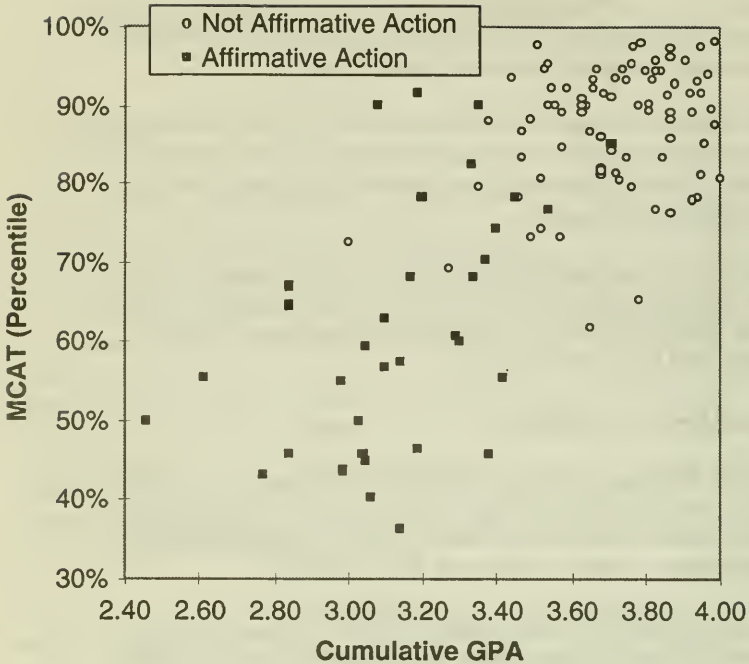


Figure 1: Scatter Diagram of UCSD Applicants Accepted to UCSD School of Medicine, 1987-93

(1) Affirmative Action students are about 32% of the total accepted, yet they were only 13% of those who applied. Even if we ignore the obvious disparity in academic qualifications, even if we assume that all applicants are equally qualified to become doctors, is it possible that this many Affirmative Action applicants could be chosen? Is this a system of "equal opportunity" for all races? The answer is *no*. In fact, the probability of 32% of the class being from the Affirmative Action group, given that they are only 13% of the applicants, is considerably less than one in a million. (For comparison purposes, the chance of being dealt 4 aces in a poker hand is approximately 1 in 50,000. Thus it is 20 times more likely to be dealt four aces than it is that 32% of the class would be made up of Affirmative Action applicants.) Applicants are being selected (and therefore others will be rejected) *specifically because* they are members of preferred racial groups.

(2) At the lower grade point averages and medical college admission test scores the *only* accepted students are those from the four groups classified as Affirmative Action; there are none from the other 14 racial groups. Of course, the characteristics which make a good physician include more than academic ability, and admissions committees consider many qualitative attributes as well. However, there should be at least *some* other applicants — be they Vietnamese, White or some other racial group — who, in spite of lower academic measures, have qualities of character and compassion, or have overcome obstacles that merit their acceptance. Our study shows that people with lower academic qualifications are not accepted, *unless* they are of the preferred races.

(3) Those accepted fall into two almost distinct groups. As a result of race-based admissions, the average GPA and medical test scores of accepted Affirmative Action students is in the lowest 1% of the other accepted students. The reason this happens is that the quota overwhelms the applicant pool. If Affirmative Action applicants had been accepted in approximately the proportion that they applied (about 13%), the average would not have been so low, because we would be looking at only the most qualified of the Affirmative Action pool. At the same time, the academic performance of the others admitted would dip farther down, resulting in a mixing such as is seen in medical schools in other parts of the country.

Figures 2 and 3 illustrate how the quota overwhelms the applicant pool. In this example, a measure of student quality, shown on the horizontal axis, embraces both academic and non-cognitive attributes, such as life experiences.

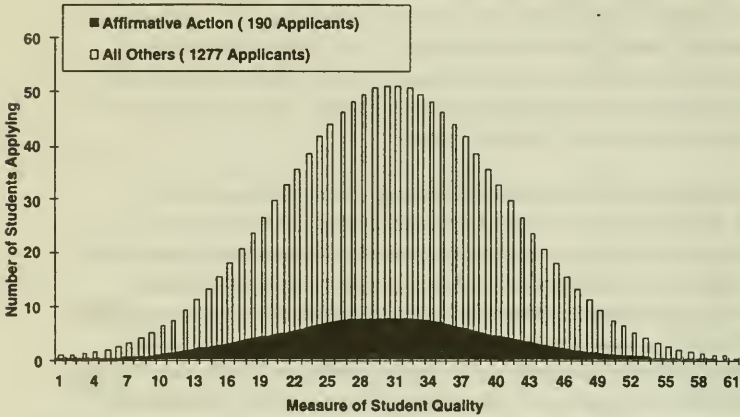


Figure 2: UCSD Applicants to UCSD School of Medicine, 1987-93

Figure 2 shows the group of applicants from UCSD, divided into Affirmative Action applicants and others. Assume student quality falls along a normal distribution in both the Affirmative Action applicant group and the other applicants. That is, a few of the applicants from each group have a lot of these qualities and a few are distinctly lacking, but most students fall in the middle.

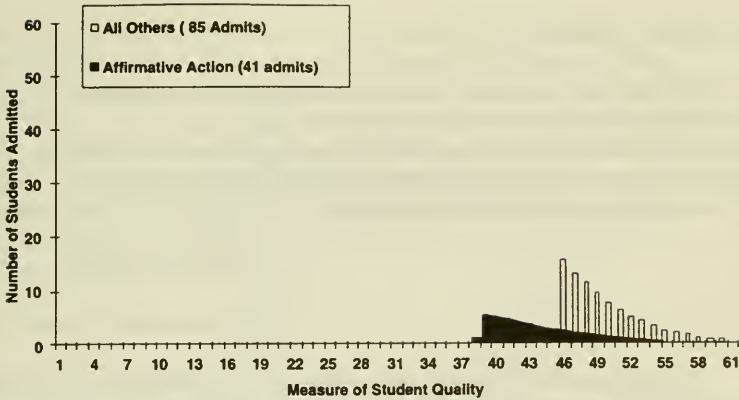


Figure 3: UCSD Acceptances to UCSD School of Medicine, 1987-93

Figure 3 shows what happens when applicants from the smaller group are preferred. Of course, the most qualified are chosen first, in this case, until they make up 32% of the class. This requires dipping pretty far down into the applicant pool. When the remainder of the class is chosen from the larger pool of applicants, again starting from the most qualified, only the very top candidates are taken. This results in the split that you see in Figure 1 and in Figure 3.

Applicants from UC Irvine

Figure 4 illustrates the students who applied from the University of California, Irvine, to all the UC medical schools. Here we have broken the students into three groups — Affirmative action, Vietnamese, and everyone else. Vietnamese applicants were chosen for study because most people are familiar with their flight from Vietnam and the subsequent struggle with poverty, language, and a totally new culture.

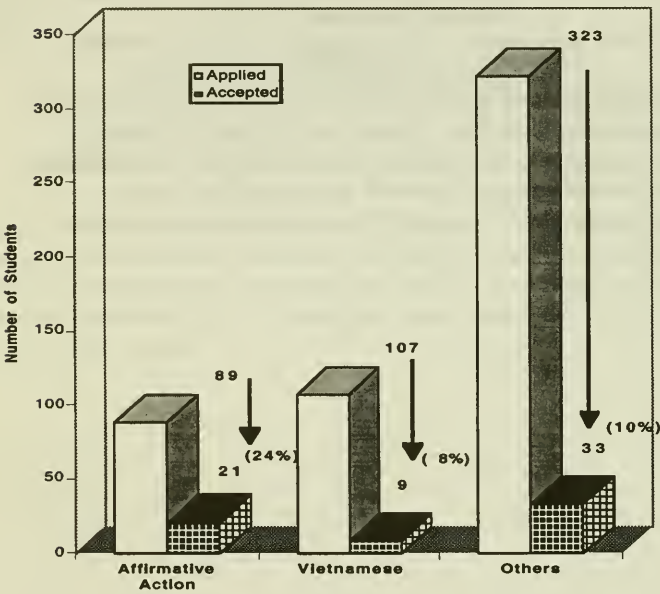


Figure 4: UCI Applicants to UC Schools of Medicine in 1993

There were 89 Affirmative Action applicants from UC Irvine to all the UC Medical Schools. Of these 21 were offered admission. Of the 107 Vietnamese applicants, however, only 9 were accepted. The average GPA of the accepted Affirmative Action applicants was 3.24, while the average GPA of the accepted Vietnamese applicants was 3.79. This is an

enormous disparity (The average grade of all UCI students applying to medical school is near 3.2). The Affirmative Action admits have an average GPA that places them in the lowest 1% of the Vietnamese who were admitted. It is important to note that 66 of the 98 Vietnamese denied admission had a GPA above the 3.24 average of the Affirmative Action admits, but only *one* Affirmative Action applicant was turned away with a GPA above this level. It has been alleged that current Affirmative Action practices do not hurt individual members of other groups. However, it would be difficult to explain personally to each Vietnamese applicant and family why it was necessary to accept an Affirmative Action applicant with lesser academic qualifications.

Is Economic Disadvantage a Factor?

Finally, to investigate whether economic disadvantage has any place in admissions decisions, we took the UC Irvine data and looked at Affirmative Action applicants who are **not poor** and compared them to applicants who indicated that they are poor, but did not fall under Affirmative Action. The medical school application includes a section where the students can indicate whether they are economically disadvantaged. There were 37 Affirmative Action applicants who were not poor, of these 9 were offered acceptance, about the same proportion (24%) as for the poor Affirmative Action applicants. However, for those who were **poor, but not Affirmative Action**, out of 89 only 5 were accepted, about 6%. While preference is given to those considered disadvantaged solely because of their race, the economically disadvantaged continue to suffer in the medical school admissions process. Their acceptance rate is even lower than that of the general non-Affirmative Action group, which is about 10%.

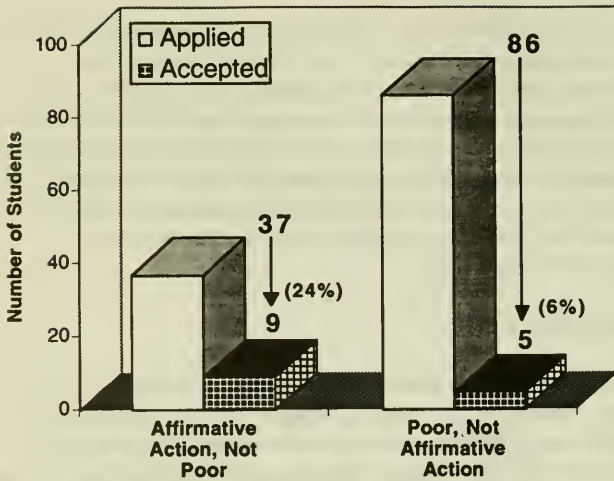


Figure 5: UCI Applicants to UC Schools of Medicine in 1993: Affirmative Action, Not Poor versus Poor, Not Affirmative Action

Conclusion

The results of our research, only part of which are shared here, lead inexorably to the conclusion that race is not “just one factor” considered in UC medical school admissions, it is *the major factor*. In fact, in a recent press interview, a UC dean confirmed that economic disadvantage is not considered in admissions to medical school, that only race is considered a disadvantage. The practice of Affirmative Action in the UC Medical Schools has become a system of racial preferences with the results described above. Preferring one group of applicants has led to discrimination against other groups — it’s not just white males, but men and women of any ethnicity other than the favored few.

Appendix 1: Pass Rates on the US Medical Licensing Exam (USMLE)

University of California officials have frequently stated that all Affirmative Action applicants accepted to medical school are fully qualified, and that they all pass the national licensing exam. (Usually this is stated as "The first time pass rate is 100%.") While it is true that *at UCSF* the pass rate on the USMLE is 100%, it is *not* true at the other campuses. The chart below shows the number of affirmative action students entering UC Davis, the number of affirmative action students who sit for the exam (not all of them do), and the number who pass.

First Time Takers of the USMLE Step 1 Exam at UC Davis

Class Entering	<u>88-89</u>	<u>89-90</u>	<u>90-91</u>	<u>91-92</u>	<u>92-93</u>
AA Entering	26	23	17	21	22
Test Year	1990	1991	1992	1993	1994
No. of 1st Time AA Takers	19	17	14	20	18
No. of 1st Time AA Passers	17	12	13	19	15

Over this five year period, 109 affirmative action students entered the medical school, only 88 took the exam, and only 76 passed. We recognize that some students take more than two years to prepare for this exam (see attached document *The Longer Road to Medical School Graduation*), but even so, there is no way that UC can claim a 100% pass rate. UC should be proud that their performance is above the national average (see attached *Performance on the National Board of Medical Examiners Part I Examination by Men and Women of Different Race and Ethnicity*), and proud that UCSF ranks so highly, but it is *not* the 100% pass rate that they claim. Who pays for the training of students who will not pass the licensing exam, or will only do so after additional years of study? Would we have better results if all students were held to the same standards of admission?

National studies show that race is not the determining factor in national board performance, but rather undergraduate science GPA. Students who are equally qualified when entering medical school perform equally well. However, if a racial preference program changes the academic standards for certain racial groups and accepts students in those groups with lower science GPAs, then those racial groups will have lower national board pass rates.

Performance on the National Board of Medical Examiners Part I Examination by Men and Women of Different Race and Ethnicity

Beth Dawson, PhD; Carolyn K. Iwamoto, MEd; Linette Postell Ross, MA; Ronald J. Nungester, PhD;
David B. Swanson, PhD; Robert L. Volle, PhD

Table 1.—1988 Reference Group* Scores on the National Board Part I Examination

	No.	Mean Score†	SD	Pass, %
Women	3526	455	95	79.4
Asian/Pacific Islander	351	458	93	78.9
Hispanic	129	386	97	55.8
Black	277	369	87	44.0
White	2769	467	90	84.1
Men	6877	492	100	87.2
Asian/Pacific Islander	619	485	99	86.6
Hispanic	239	447	109	71.6
Black	271	392	97	53.9
White	5748	499	97	89.5
Total	10403	480	100	84.5

*First takers at accredited medical schools taking Part I for certification 2 years from expected graduation.

†Mean=500 and SD=100 in the previous four June Part I reference groups.

The Longer Road to Medical School Graduation

DONALD G. KASSEBAUM, MD, and PHILIP L. SZENAS, MA

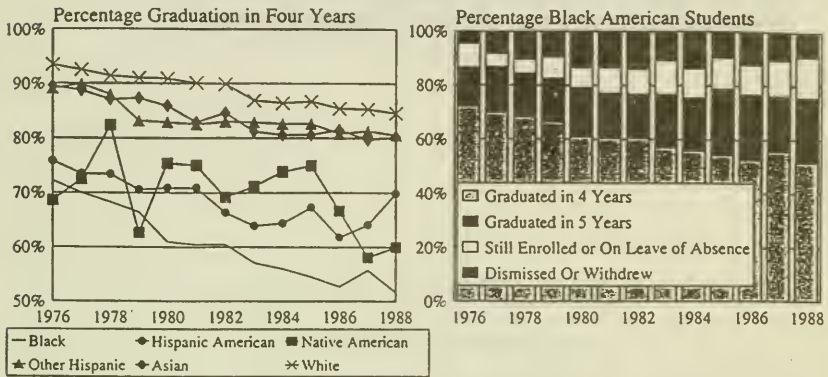


Figure 3. Left panel: Variation in the decline in four-year graduation rates of medical students who were matriculated in 1976 through 1988, related to racial-ethnic group. Right panel: Percentages of black-American students who were matriculated in 1976 through 1988 and graduated in four and five years, were still enrolled or on leave of absence after five years, or withdrew or were dismissed. (See footnote in text for fuller descriptions of the racial-ethnic categories presented in this figure.)

"Underrepresented minority students, particularly black Americans, have lower four-year graduation rates than majority students, and the rate has fallen steadily across successive classes matriculating between 1976 and 1988."

ACADEMIC MEDICINE

OCTOBER 1994

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**Mexican American
Legal Defense
and Educational Fund**

634 South Spring Street
11th Floor
Los Angeles, CA 90014
(213) 629-2512
FAX: (213) 629-8016



MALDEF

TESTIMONY OF THE
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
BY
KEVIN G. BAKER
EMPLOYMENT LITIGATION AND POLICY DIRECTOR

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

JUNE 1, 1995
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634 South Spring Street
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Los Angeles, CA 90014
(213) 629-2512
FAX: (213) 629-8016

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Suite 750
Chicago, IL 60605
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My name is Kevin Baker. I am the director of employment law for the Mexican American Legal Defense and Educational Fund (MALDEF). MALDEF is a non-profit national organization now in its 25th year working to protect and advance the civil rights of the nearly 25 million Latinos in the United States through education, advocacy and legal action. MALDEF is active in the areas of education, employment, immigrants' rights, political access and language discrimination. Because my work is in the employment area, and because there are many able witnesses who can speak to other matters that may be of interest to the subcommittee, I will confine my remarks to employment related issues.

I appreciate the opportunity to appear before the subcommittee today, and I commend you for coming to California. Your inquiry into group preferences and the law is certainly timely, and there is no better place to conduct your hearing than Southern California.

The Economic Importance of Diversity

Although we have been struggling somewhat in recent years, California is still a vital economic center of the nation. Just as importantly, as many observers have noted, California is a state of remarkable racial and ethnic diversity. Nearly half the population now comprises non-white racial and ethnic groups; the largest and one of the fastest growing shares of that population — and that labor force — is Latino.

But it is not only in California that racial and ethnic diversity is increasing. Nationally, economists tell us that, as the "Baby Boom" generation ages, Latinos and other minorities will represent a greater proportion of the labor market in the coming years. Clearly, the country's economic and financial health depends on providing good education, job and business opportunities to well-prepared minority and women students, workers and business owners. In fact, as the Baby Boom generation reaches retirement in the near future, analysts forecast that the Social Security Trust Fund will be bankrupt very shortly if young people are not prepared for and productively employed in good jobs.

Persistence of Disparity

But we have our work cut out for us. While many people across the country have struggled to make ends meet and to provide a secure future for their families in a time of economic change and uncertainty, and many have lost or fear losing their jobs, the situation is especially difficult for Latinos. In particular, Latinos face higher unemployment, lower educational attainment, disproportionate concentration in low-paying jobs and economically declining industries, income discrepancies, more layoffs, and low rates of business ownership. Although Latinos often do not want to talk about it because they do not want to appear to be complaining, it is difficult to account for these disparities without recognizing the persistence of discrimination, as indeed many studies have found.

Among these is the recent report of the Glass Ceiling Commission, under the leadership of former President Bush and Senator Dole, which found that "serious barriers to advancement remain" for minorities and women in American corporations, including "persistent stereotyping, erroneous beliefs that 'no qualified women or minorities are out there,' and plain old fear of change." The Commission reported that of senior managers at the Fortune 500 biggest firms, 97 percent are white and 95 percent male, and that Latinos are "relatively invisible in corporate decision-making positions."

It is not just that Latinos are locked out of the Board room. Despite having the highest labor force participation rate of any group, the Hispanic unemployment rate is twice as high as it is for whites.¹ Here in San Diego, the Latino unemployment rate is the highest in the nation, and the trend is worsening — not just in California but nationally.² During the last recession, Latinos and African Americans suffered the highest proportion of layoffs. This disproportionate impact can not accounted for by differences in age, education, gender, industry or occupation.³

¹ E. McKay, ed., *State of Hispanic America 1991*, National Council of La Raza (1992) at 4-5.

² *Bias Hits Hispanic Workers*, New York Times (April 27, 1995).

³ U.S. General Accounting Office, *Displacement Rates, Unemployment Spells and Reemployment Wages by Race* (9/94).

Labor market studies show that a significant factor in the earnings differential between Hispanics and whites is attributable to employment discrimination.⁴ The Fair Employment Council of Washington, D.C. sent out pairs of identically qualified anglos and Latinos to test discrimination in hiring in 1992. They found that the equally qualified Latino applicants were turned down in favor of their white counterparts for more than one job out of every five and in every type of job. Similar studies have documented even higher discrimination rates in Chicago (33%) and here in San Diego (29%).⁵

In California, 70 percent of Latinos earn less than \$20,000 per year. Again, these low incomes cannot be explained simply by education. While all workers earn more if they stay in school, the return on educational investment is substantially less for Latinos and other minorities. For every dollar earned by anglos, Latinos make just 59 cents. This pay gap persists even when age, education and language skills are taken into account. In fact, instead of diminishing, wage discrimination *grows* at each level of education. Among high school dropouts, Latinos get 63 cents for every dollar anglos receive. For Latino professionals, the disparity increases to 53 cents per dollar.⁶

⁴ C. Gonzales, *The Empty Promise: The EEOC and Hispanics*, National Council of La Raza (1993) at 3-5.

⁵ Marc Bendic, Jr., et al., *Discrimination Against Latino Job Applicants: A Controlled Experiment*, Human Resource Management (1992).

⁶ Los Angeles Times (1/10/93).

Perhaps most disturbingly, over one quarter (27%) of all Hispanic families live below the poverty level, compared to about 10 percent for non-Hispanics. Hispanic children suffer twice the poverty rate of non-Hispanics, and Hispanics are about three times more likely to be without health care protection as non-Hispanics.⁷ On average Latino families earn less than 60 percent of the incomes of anglo families, and, as with the unemployment rates, the disparity is not improving. Between 1983 and 1993, Latino income levels stagnated, while non-Hispanic incomes increased 8 percent.⁸

Divisiveness in California

Unfortunately, despite the recognition that discrimination holds back this increasingly critical element of the U.S. economy, the atmosphere in California in the wake of last year's Proposition 187 ballot initiative is increasingly polarized, racially-charged and fearful. We have witnessed widespread and increasing mistreatment of Latinos and other ethnic minorities — both immigrants and citizens — running the gamut from denial of jobs and housing to exclusion from restaurants, banks, and other commercial and public services to violent hate crimes. Many in the Latino community will tell you they believe it is open season for discrimination against people who look or sound "foreign" to some. This should not be surprising. Proposition 187 unleashed forceful and dangerous passions that are not easily controlled. Moreover, discrimination against people who appear foreign to some observers is a familiar and well-documented

⁷ U.S. Census Bureau, *Hispanic Americans Today* (1993).

⁸ U.S. Census Bureau, *The Hispanic Population in the United States* (March 1993).

phenomenon when government policy requires or encourages private persons to engage in home-made immigration decisions, as we have seen since the passage of the employer sanctions provisions of the 1986 immigration act.

The Attack on Affirmative Action

While few apparently deny that discrimination is a real and continuing problem, some nonetheless now propose to do away with affirmative efforts to provide equal opportunity. In the process, much of the conflict over immigration in California has been transferred and renewed as we lurch from the scapegoating of immigrants to an attack on affirmative action, no doubt launched in no small measure by the publication last year of the controversial book "The Bell Curve," which argued intensely against affirmative action. Many of the same forces — indeed many of the same antagonists — at work in the Prop. 187 initiative are at work in this conflict as the anti-immigrant zealots become the anti-affirmative action zealots and, more ominously, make ties with anti-government extremists and racial fanatics.

But nothing is more frightening to civil rights advocates than the apparent erosion of the long tradition of bipartisan support for affirmative action. As students of history recall, affirmative action was primarily developed by Republicans, including courageous Republican judges in the South who fashioned the broad outlines of the Supreme Court's *Brown v. Board of Education* decision into an instrument of racial fairness during the 1960s. Nationally, affirmative action has been supported by the past 8 presidents —

Republican and Democrat alike, and by two-to-one votes in recent years, bipartisan majorities in the U.S. Senate have twice defeated efforts to ban affirmative action. In California, too, affirmative action has long been supported by both Democrats and Republicans, including former Governor Reagan and former San Diego Mayor and now Governor Pete Wilson.

Sadly, in a time of economic change and uncertainty, some irresponsible politicians would play racial or "quota" politics with the important issue of affirmative action, seeking only to gain political advantage for themselves by exploiting people's fears and looking for a scapegoat to blame for economic problems that are not caused by women and minorities.

The catalyst for this new controversy is the so-called California Civil Rights Initiative (CCRI) — a title as misleading as the tobacco companies' effort last year to "regulate smoking" in California. As both its opponents and its supporters agree, CCRI would amend California's state constitution to outlaw all voluntary efforts to eliminate discrimination in education, employment and public contracting by the state and every city and county in California under state law. According to its sponsors, this would forbid even outreach efforts such as advertising in minority and women's newspapers and magazines.⁹ What is more, this initiative would apparently also make it illegal under state law for government agencies to correct their own discriminatory practices, and even

⁹ Los Angeles Times, February 19, 1995.

prohibit courts from providing remedies to people who have been subjected to unlawful discrimination.

The Preferential Treatment Myth

Regrettably, much of the public discourse on the issue of affirmative action recently has been fueled by myth and misconception, often uncritically repeated by elected officials, opinion leaders and media reporters. I am reminded of a music review in the newspaper some years ago where the author wrote:

Nothing is harder to kill than a good myth. Beat on it with hard facts, and it will hardly notice. Chop off its head, and it will grow another one by nightfall.¹⁰

In this hearing today I ask you to be vigilant and critical of the myths surrounding affirmative action.

Unfortunately, even as this committee seeks the truth on affirmative action, California's Governor Wilson — who has already endorsed the CCRI — may help to invigorate some of the myths with an announcement today in Los Angeles that, in the name of rooting out preferential treatment of women and minorities and restoring the merit principle to state government, he will abolish some minor state advisory boards, remove some incentives for meeting state hiring and contracting goals for minorities and women, and eliminate a number of programs designed to encourage recruitment and training of student interns and some temporary workers. And if past experience is any guide, few will question whether the preference myth in his message matches the reality

¹⁰ Donal Henahan, Music Views, New York Times, July 15, 1990.

of doing away with some modest forms of encouragement to include qualified workers and minority businesses who are under-represented in the state jobs and contracts because of historical discrimination). The Governor will not eliminate preferential treatment for women or minorities under state law because there are no such state laws to eliminate.

This is one of the most virulent myths about affirmative action: that it involves preferential treatment, set-asides and quotas for unqualified minorities and women. It is a myth that is particularly offensive to Latinos who have long disdained special treatment and have achieved their successes only by virtue of their own hard work. In fact, as the research office of the California Senate recently found after an exhaustive review, no California law or program provides preferential treatment or quotas on the basis of race, ethnicity or gender. Indeed, such quotas and preferences have been specifically outlawed under the U.S. Constitution. Goals and timetables of course are not quotas or preferences. They are targets and time frames set to reach equal opportunity coming from business management principles teaching that the best way to achieve results is to establish clear objectives and measure performance along the way.

The Truth About Affirmative Action

Far from offering preferential treatment, what California's affirmative action programs do is to provide a measure of equal opportunity requiring no more than simple good faith efforts to eliminate discriminatory barriers and open the doors to qualified

minorities and women where they have historically been left out and are therefore under-represented in state employment, education and contracts. The purpose of affirmative action is to create an environment where equality opportunity and merit can prevail and each person can contribute his or her full potential. These voluntary efforts are designed to ensure that the state does not discriminate and to avoid the costly and cumbersome law suits, court orders and penalties for discrimination that we all must bear as taxpayers. These affirmative efforts to avoid discrimination are not just good for the government, they are good for American families, especially in hard economic times when several members of the family must work to make ends meet. Wives, daughters and mothers in particular have been given an opportunity under affirmative action to enter the work force and obtain better jobs. Affirmative action is also good for the economy, fostering small business development, long a gateway to the middle class, and providing economic opportunities for minorities and women that once did not exist and that we must continue to support if we are serious about reforming welfare.

No doubt for these reasons business leaders and organizations such as the Business Roundtable and the National Association of Manufacturers have repeatedly endorsed affirmative action, and studies have shown that companies with the best equal opportunity/affirmative action records have the highest profit margins.¹¹ If we want

¹¹ T. Cox and C. Smolinski, *Managing Diversity and Glass Ceiling Initiatives as National Economic Imperatives*, U.S. Dept. of Labor (1994).

government to be run like a business, we should follow — not forbid — affirmative action in the public sector.

Preferential Treatment Schemes

It is true that there are some group preference programs enacted or allowed in California, but these involve preferences on the basis of such things as military service for veterans, jobs and business deals for relatives, job protection based on seniority, geographical diversity in college admissions and special college admission policies for the children of alumni. Of course, proposals to abolish affirmative action, such as the CCRI, are not concerned with these types of group preferences. Neither does the CCRI address disparate treatment on the basis of religion, age or disability, and it would not also not affect any race or gender based programs by private businesses, such as the scholarships ear-marked for minorities at the Heritage Foundation.

Nor would proposals to abolish affirmative action, such as the CCRI, provide any alternatives to help those in need. Some have suggested that economic disadvantage — itself just another form of group rights — should replace gender and race as the basis for government hiring, education programs and contracting. But the CCRI would not provide for this. Others have suggested that consideration of race, ethnicity or gender could be unnecessary by providing equal opportunity to everyone in the form of equal education and training. At the same time, however, job training programs for youth have

already been gutted by one third this year, and more draconian rescissions are in the offing.

The Reverse Discrimination Myth

The preferential treatment myth is related to another popular and pernicious misconception: that we have somehow lost our way on civil rights, that affirmative action is out of control, causing reverse discrimination against whites in general and men in particular, and that we need to return to some earlier period when we adhered to the original intent of a color-blind system of laws. Nothing could be further from the truth. Because I am an attorney by training I hope you will forgive me for asking: where is the evidence of reverse discrimination? Why is the unemployment rate for white males so much lower than it is for minorities and women? Why do white men enroll and graduate from college at rates that eclipse those of other groups? Why are white males over-represented in every California state agency and whites all together were more than three-fourths of the new hires for officers and managers in 1993? Why has every attempt to document discrimination against whites and men shown that such claims are extraordinarily rare, and that a high proportion are thrown out of court because they are brought simply by frustrated job applicants who are less qualified than the chosen woman or minority candidate.¹²

¹² Urban Institute (1992): See also A. Blumrosen, U.S. Dept. of Labor study, BNA Daily Labor Report (3/23/95).

This absence of evidence for reverse discrimination is consistent with the law. Not only has affirmative action not expanded since its inception, it has been gradually and consistently narrowed from the outset, and affirmative action programs have for some years been subject to the strictest scrutiny and the most rigorous standards under the law. But the color-blind myth is wrong for another reason as well. The United States Constitution has never been absolutely colorblind. The Supreme Court rejected this idea in the 1800s and it has consistently rejected it since. In fact, the Constitution is both colorblind and color-conscious — colorblind to ensure that laws do not cause harm or deny a benefit based on race or ethnicity and color-conscious to prevent discrimination and to undo the effects of past discrimination.

Conclusion: The Need for Unity

I will conclude my remarks with as somber an appeal as I can make. We have seen societies divide and dissolve into turmoil in other parts of the world, often on the basis of racial or ethnic conflicts. In only the past few years, these conflicts have included the former Yugoslavia, parts of the former Soviet Union, Rwanda and others. We may not be inclined to think that it can happen to us because it hasn't happened since our Civil War, although that war was also a product of racial division. But we are not immune, and many in the Latino community and elsewhere are afraid — genuinely, profoundly afraid of increasing racial and ethnic tensions, particularly here in California where the Los Angeles riot of 1992 is still painful. We are not immune from the problems of other societies or the problems of this society's history, but neither are they

foreordained. We have seen societies divide in conflict, but we have also seen them come together in times of adversity, from riots to earthquakes, fires and floods. We cannot wait for tragedy to bring us together. Like it or not, there is no "us" and "them," we are all in this diverse and remarkable society together, and we will not prosper as a nation without the contributed talent of everyone. The current attack on the modest efforts at inclusion that we call affirmative action threatens to divide us deeply. Do not engage in it. Put down the myths and misconceptions. Unite us. Call us to our highest selves. Do not pander to our meanest fears.

Statement of John Conyers, Jr.
"The Economic and Social Impact
of Race and Gender Preference Programs"
October 25, 1995

Today's hearing is part of an ill-conceived effort to roll back affirmative action programs. Many argue that affirmative action may have once had a role, but has outlived its usefulness.

In fact, however, affirmative action continues to benefit society. Such programs strengthen our economy by ensuring that businesses take advantage of the talents of all of our nations citizens, not just our white, male citizens. Attacks on affirmative action charging that unqualified minorities get preferential treatment are simply inaccurate.

Very few opportunities are awarded simply on the basis of paper and pencil tests where the highest score wins. Instead, employees are chosen based on a number of characteristics and a range of organizational needs. Employers usually identify people within a clearly acceptable range and then use judgment to make the final decision. These judgments are difficult to police. They are often made on intangible factors such as intuition or a candidate's promise.

Unfortunately, race and gender are also intangible factors that frequently influence hiring decisions.

The purpose of affirmative action is to give our nation a way to address the systemic exclusion of talented individuals, on the basis of their gender or race, from opportunities to develop, perform, achieve, and contribute. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination.

In addition, contrary to what we will hear today from some of our witnesses, affirmative action has also works to close the gaps in economic opportunity in our society, thereby strengthening the entire economy.

The facts clearly show that affirmative action has not yet outlived its usefulness. The unemployment rate for African Americans is twice that of whites. Women have narrowed the earnings gap but still make only 72% as much as men for comparable jobs.

The average income of a Hispanic woman with a college degree is still less than the average income of a white man with a high school diploma.

According the Glass Ceiling report, sponsored by Republican members of Congress, in the nation's largest companies only six-tenths of one percent of senior management positions are held by African-Americans, four-tenths of a percent are held by Hispanic Americans, and three-tenths of a percent are held by Asian Americans. Women hold between 3 and 5 percent of these positions. White men, on the other hand, make up 43% of the workforce but hold 95% of these jobs.

Earlier this week, testifying before the Senate Judiciary Committee, former Appeals Court Chief Judge Leon Higgenbotham noted that the eradication of affirmative action would trigger dire catastrophic consequences to the nation and perpetuate many of the present injustices that women and minorities still sustain. I agree. As Judge Higgenbotham noted, there would be an expansion of the income gap between blacks and whites and men and women and the scope of educational opportunities for thousands of women and minorities would be significantly reduced.

It is disgraceful that with all of the still existing racial inequities this Congress would even consider dismantling affirmative action programs. I will do everything in my power to prevent such a manifest injustice from ever taking place.



Nicholas Pastore
Chief of Police

DEPARTMENT OF POLICE SERVICE

One Union Ave, New Haven CT 06519



John DeSantis, Jr.
Mayor

TESTIMONY BY: NICHOLAS PASTORE, CHIEF OF POLICE, NEW HAVEN
DEPARTMENT OF POLICE SERVICE, NEW HAVEN,
CONNECTICUT

TO: SUBCOMMITTEE ON THE CONSTITUTION - COMMITTEE ON
THE JUDICIARY

SUBJECT: AFFIRMATIVE ACTION POLICY AND POLICING

DATE: NOVEMBER 1, 1993

WRITTEN TESTIMONY

AFFIRMATIVE ACTION, BESIDES IT'S NECESSITY TO DEAL WITH THE RESIDUAL PROBLEMS OF DISCRIMINATION, IS VITAL TO THE BUSINESS OF POLICING. RECENT EVENTS IN LOS ANGELES, NEW YORK, NEW ORLEANS, RUBY RIDGE, AND WACO HAVE UNDERScoreD POLICE MISCONDUCT AND REINFORCED PUBLIC DISTRUST IN POLICING AS AN INSTITUTION AS WELL AS IN THE WAY WE POLICE. IF A CONCERTED EFFORT BEGINNING WITH LEADERSHIP, IS NOT UNDERTAKEN TO DEVELOP POLICE CREDIBILITY AND TRUST, (ESPECIALLY IN THE AREAS OF COMMUNITY ORIENTED RECRUITMENT AND TRAINING PROCESSES), THE OPPORTUNITY FOR CONFLICT AND CONFRONTATION BETWEEN POLICE AND THE PUBLIC THEY ARE SWORN TO SERVE AND PROTECT WILL GROW.

BECAUSE OF PRE-AFFIRMATIVE ACTION PRACTICES, POLICE RECRUITMENT AND HIRING PROCESSES HELPED DEVELOP "ALL WHITE MEN'S ARMIES." THE CREATION AND PROLIFERATION OF THESE HEAVILY ARMED "SOLDIERS" MANDATED TO WAGE THE "WAR ON CRIME" BEGAN AN EFFORT WHICH,

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ESSENTIALLY, WAGED A "WAR ON PEOPLE." THESE TACTICS AND THEIR EFFECT REASONS WHY POLICE MUST THOUGHTFULLY AND AGGRESSIVELY RECRUIT PROSPECTIVE POLICE OFFICERS FROM THE COMMUNITY, NOT JUST PASSIVELY SELECT ANY WHO APPLY FOR THE JOB.

WE ARE STILL PAYING A HEAVEY PRICE FOR OUR ACTIONS OF THE PAST. THE EXCLUSIVE POLICE CULTURE AND "US AGAINST THEM" MENTALITY WHICH DEVELOPED AS A RESULT OF USING NEIGHBORHOODS AS BATTLEFIELDS HAVE EFFECTIVELY POLARIZED POLICE AND THE PUBLIC. INSTEAD OF FUNCTIONING AS "PEACE KEEPERS" WHERE ONE-TO-ONE CITIZEN CONTACT, AN ESSENTIAL ELEMENT OF POLICE WORK, IS PROMOTED, POLICE PRACTICE AND ATTITUDE HAS BEEN REDUCED TO A SINGLE PURPOSE: TAKING NAMES AND BEATING HEADS, AND MAKING ARRESTS WITH THE GOAL BEING TO WIN EVERY FIGHT.

TO FUNCTION EFFECTIVELY IN THE 21ST CENTURY, POLICE MUST LEARN FROM PAST HISTORY. WE MUST USE WHAT WE WAS ELOQUENTLY STATED BY THE KERNER, CHRISTOPHER, WARREN, AND MOLLEN COMMISSIONS TO MAKE THE NECESSARY REFORMS IN THE BUSINESS OF POLICING. TO SUPPORT THIS EFFORT, GOVERNMENT IS THE BEST INSTRUMENT TO PROMOTE SOCIAL CHANGE AND ENHANCE EQUAL OPPORTUNITY. GOVERNMENT MUST UPHOLD AFFIRMATIVE ACTION NOT ONLY TO LEVEL THE PLAYING FIELD SO THAT DISADVANTAGED GROUPS, ESPECIALLY WOMEN AND MINORITIES, CAN REACH THEIR FULL POTENTIAL, BUT, WITH RESPECT TO POLICING, SO THAT POLICE AND THE WAY WE FUNCTION CAN BE EFFECTIVE.

THE INSTITUTION OF AFFIRMATIVE ACTION POLICIES IN POLICING HAS SERVED TO MOVE US BEYOND THIS POSITION OF CONFLICT AND

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DIVISIVENESS. BECAUSE OF THE NATURE OF POLICE WORK, THE FORMATION AND MAINTENANCE OF TIES TO THE COMMUNITY ARE ESSENTIAL TO CREATING A POSITIVE IMAGE AND WORK ENVIRONMENT. AFFIRMATIVE ACTION POLICY HAS DIRECTLY AIDED POLICE IN NEW HAVEN, CONNECTICUT IN THIS MANNER. FIRST, THE HIRING OF AN INCREASED NUMBER OF WOMEN AND PERSONS OF COLOR HAS HELPED THE DEPARTMENT WORK FORCE TO BECOME MORE REFLECTIVE OF THE COMMUNITY IN WHICH WE SERVE. OUR GOAL OF ATTAINING A CRITICAL MASS OF THESE GROUPS COMBINED WITH CREATING AND MAINTAINING A SUPPORT SYSTEM FOR WOMEN AND PERSONS OF COLOR HAS LED TO BOTH INTERNAL AND EXTERNAL ADVANTAGES.

AS A RESULT OF THESE EFFORTS, OUR DEPARTMENT HAS NOT ONLY GAINED INCREASED CREDIBILITY AND TRUST FROM CITIZENS, BUT OFFICERS HAVE ALSO FORMED DIRECT TIES TO SUB-POPULATIONS AND GAINED ACCESS TO RESOURCES WITHIN THE COMMUNITY WHICH WERE FORMERLY HOSTILE OR INACCESSIBLE TO POLICE AND POLICE RECRUITMENT. RESIDENTS, WHO NOW ACTUALLY KNOW POLICE ARE MORE WILLING TO WORK TOGETHER WITH US.

MOREOVER, GIVEN THE TIME HONORED STATUS OF POLICE AS ROLE MODELS FOR YOUTH, THE POSITIVE EFFECTS OF DIVERSITY ALSO REACH YOUNG PEOPLE IN THE COMMUNITY AND THUS FOSTER A MORE POSITIVE IMAGE OF POLICING. LASTLY, AS POLICE ARE ONE OF THE VERY FEW SOCIAL SERVICE AGENCIES TO CONTINUE MAKING HOUSE CALLS, THE NECESSITY OF A DIVERSE RANGE OF COMMUNITY TIES, RELATIONSHIPS, AND RESOURCES IS EVEN MORE CRUCIAL TO THE FUNCTION OF POLICE AS AN INSTITUTION IN SOCIETY.

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THE BENEFITS OF DIVERSITY IN POLICING AS MENTIONED ARE THE ONES WHICH HAVE ONLY JUST BEGUN TO BECOME ACCEPTABLE, LET ALONE ACHIEVED, OVER THE LAST TWO DECADES. THE CHANGING OF ANY ORGANIZATION IS A LONG-TERM PROCESS AND IS NOT LIKELY TO OCCUR WITHOUT SUPPORT AND AN INCENTIVE, SUCH AS THE REQUIREMENT OF CONFORMING TO LAW. THE DANGER OF ABOLISHING AFFIRMATIVE ACTION POLICIES FOR POLICE DEPARTMENTS WOULD CAUSE A REVERSAL OF THE PROGRESS THAT HAS BEEN MADE THUS FAR, AND COULD EASILY CREATE AN UNSTABLE SITUATION OF POLICE WORK AND COMMUNITY INTERACTION THAT WE HAVE JUST BEGUN TO RISE ABOVE.

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DEPARTMENT OF JUSTICE SUBMISSIONS TO REPRESENTATIVE EDWARD R. ROYCE'S
QUESTIONS

1. What was the basis for the Department's investigation of the City of Fullerton, California? When was the investigation initiated?

As we have stated previously in letters from the Deputy Attorney General and from Kent Markus, it would be inappropriate for the Department to discuss the specifics of the Fullerton matter, because it remains an ongoing investigation.

As a general matter, the Department determines which jurisdictions to investigate based upon information it receives about public employers from a number of sources, including citizen mail, congressional correspondence, and complaints filed with the Equal Employment Opportunity Commission ("EEOC"). The Department also reviews and analyzes census data and EEO data contained in reports submitted by employers to the EEOC relating to employment of minorities and women and, on occasion, other similar reports. This data is analyzed in conjunction with relevant labor market data. If the data reveal a substantial underrepresentation in a particular job category or very low hiring rates relative to the availability in the relevant labor market, the Department may engage in further inquiry pursuant to Section 707 of Title VII to determine whether a violation of law has occurred.

Formal pattern or practice investigations are initiated only upon approval of the Assistant Attorney General for Civil Rights. Immediately after a formal investigation has been approved, a letter signed by the Assistant Attorney General is sent to the employer notifying it of the commencement of the investigation.

2. How does the Department determine which cities to investigate?

Again, as noted above, the Department evaluates information from a variety of sources in determining which public employers to investigate pursuant to Section 707 of Title VII. It initiates investigations if there is statistical or other information indicating that a violation of Title VII may have occurred.

3. If the Department uses statistics as a basis for initiating an investigation, how are factors such as applicant qualifications and interests weighed? What is the statistical model used?

In evaluating the representation of race, ethnic and gender groups in a given employer's workforce and among that employer's recent hires, prior to authorizing a formal

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investigation, the Department takes into account job-related, non-discriminatory qualifications required to perform the job(s) in question, to the extent permitted by the data then available to the Department.

Generally speaking, "interest" cannot be accurately measured without application data, and this kind of data is not available to the Department prior to the commencement of a formal investigation. The Department does seek application data during its formal investigations. When such data are made available to the Department, it is carefully reviewed and analyzed. However, such data are not useful for measuring "interest" among race, ethnic or gender groups if the employer is or has engaged in employment practices that effectively discourage individuals from any race, ethnic or gender group from applying. See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 367-71 (1977).

The statistical model typically used at the investigative stage assesses the probability that underrepresentation of a race, ethnic or gender group in an employer's workforce could be the product of chance rather than unlawful discrimination. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 308-309 n.14 (1977).

4. To the extent the Department relies upon anonymous complaints, how does it verify the legitimacy of claims and allegations?

Generally, the Department does not rely on anonymous complaints. As with any information, the Department investigates to verify the legitimacy of any claims or allegations made by individuals concerning an employer's practices. Typically, we attempt to locate and review all relevant data, documents and/or witnesses before determining whether the allegations of unlawful practices are true or false. After the commencement of a formal investigation, this is frequently done with the assistance and cooperation of the employer.

5. What type of findings are provided to the city following completion of an investigation before or at the time a consent decree is presented?

As a general matter, if the Department determines that the city is engaged in unlawful discriminatory conduct, we send a letter to the employer at the completion of an investigation, setting forth the results of the investigation, informing the employer that a lawsuit has

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been authorized, and inviting the employer to engage in settlement negotiations as an alternative to litigation.

When the consent decree is presented in the course of settlement negotiations, the Department offers to discuss the proposed relief provisions and the factual basis for those provisions. Often, our experts are made available to discuss with the employer the factual foundation for the decree provisions.

6. If no intentional discrimination is found but there is reason to believe a city could perform more effectively in recruiting minorities, what type of positive program is suggested by the Department -- or does the Department simply rely upon intimidation [e.g. "We will sue you so you better sign a consent decree"]?

If a violation of law is found, the Department first seeks an appropriate voluntary resolution through negotiation to avoid a trial. Typically, in order to stimulate and promote settlement negotiations, the Department will provide to the employer a proposed consent decree. If recruitment is in issue, the proposed decree will include a comprehensive recruitment program based upon decrees that we have entered in the past with other employers. However, the Department attempts to make clear that the proposed decree is simply a starting point for negotiations and that modifications may be made to address a given employer's concerns and constraints, as long as the end result is an effective remedy for the violation of law.

If the investigation is concluded and no violation of law is found, the employer is informed, and no further action is taken.

7. Who in the Department decides whether to proceed against an agency?

The Attorney General has delegated this power to the Assistant Attorney General for Civil Rights.

8. What is the Division's budget for litigation? What is the budget for development of model programs for correcting discrimination? Is any solution offered other than litigation or consent decrees?

Most of the Division's budget goes for litigation generally. The Employment Litigation Section's budget for Fiscal Year 1995 was \$5.8 million.

The Department of Justice is a law enforcement agency and Congress has given it no authority or budget to provide technical assistance to employers for employment discrimination cases. That role has been assigned to the EEOC under Title VII of the Civil Rights Act of 1964. Thus, in the context of employment discrimination on the basis of race, sex, national origin and religion, the Department does not give advisory opinions or develop model programs for correcting discrimination. However, models could be drawn from any number of our consent decrees, and we have worked closely with employers under consent decrees to help them develop effective recruitment programs and job-related selection devices.

We seek litigated orders or consent decrees to resolve our cases where a pattern or practice of discrimination is alleged to ensure that the due process rights of third parties potentially affected are preserved and to ensure that the settlement is readily enforceable. In limited situations, when no prospective relief is needed to remedy the violation, we have begun to enter into out of court agreements to resolve individual charges of discrimination.

9. How far back does the Department go in investigating and analyzing a public agency's employment practices? Is there a limit or statute of limitations on such matters?

For state and local governments, employment discrimination has been illegal under Title VII since 1972. Title VII does not contain a statute of limitations applicable to the Department of Justice when it proceeds under its pattern or practice authority. We customarily do not seek back pay more than two years prior to the date that the employer was first placed on notice of a Title VII violation of the nature alleged in our complaint. As a general matter, discrimination that ended years ago is of far less concern to the Department than ongoing acts or patterns of discrimination or more recent discrimination.

10. What constitutes an "approved" written exam? Does the Department have any approved tests that a city could use for such occupations such as police officer or fire fighter that can provide a safe haven from DOJ challenge?

Section 105(a) of the Civil Rights Act of 1991 requires an employer that has used a written exam with an adverse impact against a race, ethnic or gender group to demonstrate that the exam is job-related for the position in question and consistent with business necessity. See also Griggs v. Duke

Power, supra; Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The Department routinely retains experts to review evidence of job-relatedness. Over the years there have been exams developed by employers which the Department has reviewed and concluded are appropriately job-related to the particular positions in question. In addition, the Division has provided expert counsel and advice to defendants under consent decrees during the development of job-related selection procedures. After the employer has implemented a test which the Department has found to be job-related, and therefore lawful, the Department does not object to the use of that test and in some instances has agreed to join the employer in defending such tests from challenges by third parties.

Due to differences in job content and working conditions, there are no "one size fits all" tests (even in jobs that seem very similar to the layperson), although job-related tests can sometimes be adapted to different jurisdictions if validation procedures are followed.

11. If a city has operated in good faith based upon a test that has been validated by psychological experts, is that acceptable, or must the city prove the validity of its tests? How does it do that?

The law requires that if an employer's test has an adverse impact on a race, ethnic or gender group, the employer must demonstrate the job-relatedness of its test. Adverse impact is not excused by a "good faith" or detrimental reliance on an expert's opinion or recommendation. See Griggs v. Duke Power, supra. The law places on the employer the responsibility to determine that its employment tests are valid. Through documentation, the employer must show that its expert performed a validity study that meets professional testing standards.

12. Is there a point where common sense would dictate that the process is not cost effective to DOJ or the city involved? Is any analysis done by the Department to determine the actual benefit to employees and employers of a particular course of action or demand, in order to insure the proper expenditure of public funds, federal and local?

The responsibility of the Department is to enforce the law. A concerted effort is made by the Department to remedy violations of federal civil rights law by consent decree, thereby eliminating the expense of litigation. The

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Department does not require employers to hire unneeded employees, to hire, transfer or promote anyone who is not qualified, or to hire or promote any lesser qualified individual over a more qualified individual. Rather, it works with employers to come to a negotiated solution, consistent both with the employer's business needs and enforcement of Title VII.

Unlawful discrimination presents a large, but not easily quantifiable, cost to society. Remedies to address unlawful discrimination take this into account, especially in the context of a negotiated settlement by consent decree.

13. Does the Department require cities to set goals for employment of minorities and then monitor them? For how long?

In order to remedy violations of Title VII, the Department seeks to have employers adopt, as appropriate, affirmative recruitment measures and non-discriminatory employment practices, as well as remedies for victims of discrimination, (e.g., reinstatement, back pay, damages, pension and seniority relief). Consistent with constitutional and Title VII standards, when hiring, promotional or long-term goals are necessary to eradicate the discriminatory practice in question, the Department seeks such goals.

The duration of our recently entered consent decrees typically ranges from three to five years, although under their terms, their length can be extended if the district court determines that the purposes of the decree have not been substantially fulfilled.

The Department monitors consent decrees for their duration to ensure that the employer is implementing them in good faith.

14. What equal treatment protection is afforded to potential non-minority applicants when a consent decree is in effect? Will non-minority applicants who possess equal or better qualifications be discriminated against? Doesn't this mean innocent non-minority applicants pay part of the price of a settlement?

In any case involving class-wide relief, as a matter of policy, a "fairness hearing" is conducted before the court to determine that the proposed decree meets the requirements of federal law. One of the primary purposes of the fairness hearing is to ensure that the court hears and considers the views of those groups and individuals who wish to challenge

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the consent decree's lawfulness and may be adversely affected by its terms. This is one of the principal reasons that a court-approved consent decree is required in pattern or practice cases; an out-of-court settlement does not permit a judicial determination of whether the proposed remedy is fair and just to all persons whose interests may be affected by the decree.

If an employer is using a legal selection device (i.e. job-related for the position in question and consistent with business necessity), it can continue to do so even if the device has an adverse impact on minorities. However, if selection devices do not accurately measure qualifications for the position in question, use of such devices cannot be used to draw the conclusion that any applicant is "equally or more qualified" than another.

15. What is the Department's past record regarding the temporal duration of consent decrees?

As noted above, most of our recently entered consent decrees resolving pattern or practice cases today last from 3 to 5 years. In the past, consent decrees had no specific termination date, but remained in effect until it could be demonstrated that the purposes of the decree had been satisfied.

16. What does the Department record reflect regarding the number of individual claims for compensation under consent decrees in disparate impact cases vs. the actual number of claims approved?

In our consent decree cases, an average of one-half of individuals who file claims for compensation pursuant to the terms of the decree actually receive awards of relief. This data is based on our experiences in large pattern or practice cases, e.g., the State of Georgia, Mississippi State Department of Public Welfare, the Louisiana Department of Transportation & Development, the Delaware Department of Corrections and the Florida Department of Corrections.

17. In pursuing disparate impact claims in occupations requiring a high level of skills for entry, such as police and fire fighters, how does the Department determine the number of eligible claimants? Are general population statistics used, or "qualified" population statistics? If the latter, how is the body of qualified people defined? Does the Department have any programs to help people become qualified?

Each case requires an individualized determination of the relevant labor market. There may be questions whether a job in fact requires a high level of education and/or skill for entry, or whether employees are placed in training programs or trained on the job. As a general matter, in identifying the relevant labor market the Department takes into account all bona fide, nondiscriminatory qualifications necessary to perform the job immediately upon hire. The Department uses information sources such as census data, EEO reports or applicant flow reports to determine the percentage of qualified persons within the labor force and the number of claimants potentially eligible for relief. Other standard-setting authorities may provide helpful guidance as to qualifications necessary for a job. Many of our consent decrees require the employer to establish training programs for applicants to assist in preparing them for written and physical tests.

Claimants can receive awards of relief only if they meet all bona-fide, non-discriminatory qualifications for the job necessary to perform the job immediately upon hire.

18. /Why does the Department insist on court-ordered consent decrees as opposed to some other method of compliance assurances?

We seek litigated orders or consent decrees to resolve our cases where a pattern or practice of discrimination is alleged to ensure both that third parties who may be potentially adversely affected by the relief have the opportunity to present objections to the court and that the settlement is enforceable in court.



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OFFICE OF THE CITY COUNCIL

303 WEST COMMONWEALTH AVENUE

• FULLERTON, CA 92632-1775

February 28, 1995

Telephone • (714) 738-6311

Facsimile • (714) 738-6758

The Honorable Edward Royce
U.S. House of Representatives
305 N. Harbor Blvd., Suite 300
Fullerton, CA 92632

Dear Representative Royce:

I am writing to you on behalf of the City of Fullerton to seek your guidance and advice with respect to a matter involving the United States Department of Justice. In 1992, the Department began an investigation into the City's hiring practices. Four months ago we received a communication that the Department concluded the City had not hired enough minority police officers and fire fighters, and threatened to undertake litigation unless the City entered into a consent decree, a copy of which is enclosed for your reference.

The City in no way supports any form of discrimination, and its hiring practices have always been based upon the most qualified candidate. While the City does not believe it has practiced any form of discrimination, defending itself in this matter could be very expensive. (We were recently informed that the City of Torrance, in defending itself against a similar charge, has expended in excess of a million dollars in attorney fees.) On the other hand, as you can see, the consent decree itself would also be expensive, and actually requires the City to give candidates preference based upon their race or national origin. Among other things, the City is also concerned about being compared to Los Angeles County, and about hiring additional administrative personnel when such may not actually be necessary.

I look forward to hearing from you.

Very truly yours,

Julie Sa
Julie Sa
Mayor

JS:kyt
Enclosure
cc: City Manager

JULIE SA
MAYOR

CHRIS NORBY
MAYOR PROTEM

DON BANKHEAD
COUNCILMEMBER



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